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Supreme Court, U.S.
FILED

No. 10-____ 10-153 JUL 28 2010

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IN THE

Supreme Court of the United States

THOMAS PAUL MOYER, VANESSA COLLEEN STURGEON, and SONJA R. TUNE,
Petitioners,

v.

STATE OF OREGON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is an Oregon campaign finance statute that imposes felony criminal liability for misstatements about the source of campaign contributions without requiring either *mens rea* or materiality as elements of the offense overbroad in violation of the First Amendment to the United States Constitution?

RULE 14.1(b) STATEMENT - PARTIES

The following were parties to the proceedings in the Supreme Court of the State of Oregon:

1. Thomas Paul Moyer, Defendant-Respondent/Petitioner on Review.
2. Vanessa Colleen Sturgeon, Defendant-Respondent/Petitioner on Review.
3. Sonja R. Tune, Defendant-Respondent/Petitioner on Review.
4. State of Oregon, Plaintiff-Appellant/Respondent on Review.

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v.

STATE OF OREGON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

PETITION FOR A WRIT OF CERTIORARI

Thomas Paul Moyer, Vanessa Colleen Sturgeon and Sonja R. Tune ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Oregon in this case.

OPINIONS BELOW

In an unpublished opinion, the Oregon trial court dismissed the criminal indictments against Petitioners on the grounds that the Oregon statute at issue, Or. Rev. Stat. § 260.402 (2003), violated the free speech guarantees of the Oregon Constitution and was unconstitutionally overbroad in violation of the First Amendment to the United States Constitution.

(App., *infra* 1a-2a). In a published *en banc* opinion reported at 200 P.3d 619 (Or. Ct. App. 2009), the Court of Appeals of the State of Oregon reversed the trial court, with the majority rejecting Petitioners' state and federal constitutional claims. (App., *infra* 4a-45a). The Supreme Court of the State of Oregon affirmed in a published opinion reported at 230 P.3d 7 (Or. 2010). (App., *infra* 46a-74a).

JURISDICTION

The Supreme Court of the State of Oregon's judgment was entered on April 29, 2010. The jurisdiction of the United States Supreme Court is invoked in a timely manner under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Oregon statute at issue, Or. Rev. Stat. § 260.402 (2003), is set forth in its entirety at App., *infra* 75a. The First Amendment to the United States Constitution is similarly set forth at App., *infra* 76a.

STATEMENT OF THE CASE

This case presents an important question about the constitutional limits of campaign contribution disclosure requirements: Does the First Amendment to the United States Constitution permit a state to impose felony criminal penalties for unknowing and immaterial violations of campaign contribution disclosure requirements that are committed by donors to political candidates or ballot measures? The answer to that question is of national importance because states increasingly are using campaign disclosure statutes to regulate election conduct and because the threat of such severe criminal penalties for even inadvertent and immaterial violations of campaign

disclosure statutes has a strong potential to infringe on constitutionally-protected speech and participation in public elections.

1. Factual Background. On September 24, 2004, the State of Oregon ("the State") filed felony criminal charges against Petitioners Thomas Paul Moyer, Vanessa Colleen Sturgeon and Sonja R. Tune for allegedly violating Or. Rev. Stat. § 260.402 (2003).[1] That statute provides, in part:

> *No person shall make a contribution to any other person, relating to a nomination or election of any candidate or the support or opposition to any measure, in any name other than that of the person who in truth provides the contribution.* No person shall knowingly receive the contribution or enter or cause it to be entered in accounts or records in another name than that of the person by whom it was actually provided. (App., *infra* 75a (emphasis added)).

Or. Rev. Stat. § 260.402 criminalizes the giving of *any* contribution, no matter how small, in a name other than that of the person who provides the funds, despite the fact that Oregon's campaign finance law only required candidates and political committees to file statements listing the name, address, and occupation of campaign contributors if the contributor contributed "an aggregate amount of more than $50."

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[1] The Oregon Legislative Assembly amended Or. Rev. Stat. § 260.402 in 2005 and 2007, but made no substantive changes to the relevant portions of the statute. *See* Or. Laws 2005, Ch. 797, § 19; Or. Laws 2005, Ch. 809, § 15; Or. Laws 2007, Ch. 848, § 30. All references to Or. Rev. Stat. § 260.402 in this petition are references to the 2003 version of Or. Rev. Stat. § 260.402 because the 2003 version applies to this case.

Or. Rev. Stat. § 260.083(1)(a)(A) (2003).[2] Violations of Or. Rev. Stat. § 260.402 are prosecuted as Class C felonies under Oregon law. *See* Or. Rev. Stat. § 260.993(2) (2010). At the time of Petitioners' alleged conduct, violators were subject to imprisonment for up to five years and to fines of up to $100,000. Or. Rev. Stat. § 161.605(3) (2003); Or. Rev. Stat. § 161.625(1)(d) (2003).[3]

The first count of the State's felony indictment, which was filed in the circuit court of the State of Oregon for Multnomah County ("the trial court"), alleged that, on or about May 16, 2003, petitioners Moyer and Sturgeon "did unlawfully and knowing[ly] make a contribution to a candidate, in relation to his campaign for public office" by giving $2,500 to Portland, Oregon mayoral candidate Jim Francesconi in Sturgeon's name. (App., *infra* 78a).[4] The second count of the felony indictment alleged the identical charge against petitioners Moyer and Tune regarding a contribution of $2,000 to candidate Franscesconi in Tune's name. (*Id.*)

2. Trial Court Proceedings. Petitioners jointly demurred and moved to dismiss the indictments,

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[2] In 2005, the Oregon Legislature amended the law to increase the contribution reporting threshold to $100. Or. Laws 2005, Ch. 809, § 8.

[3] For offenses committed after September 1, 2003, the Oregon Legislature increased the maximum fine for a Class C felony to $125,000. Or. Laws 2003, Ch. 737, §§ 86, 88. The maximum term of imprisonment remains at five years.

[4] While the indictment alleges knowing conduct, the Oregon Supreme Court refused to hold that such an allegation was in fact required under Or. Rev. Stat. § 260.402, leaving open the possibility that *completely inadvertent* conduct could be prosecuted under the statute. (App., *infra* 67a, n.9).

contending that Or. Rev. Stat. § 260.402 on its face violated the free speech guarantees of both the Oregon and United States Constitutions. With regards to the United States Constitution, Petitioners argued that Or. Rev. Stat. § 260.402 directly restrained protected political speech and was both overbroad and vague in violation of the First and Fourteenth Amendments. (Defendants' Memorandum in Support of Demurrer and Motion to Dismiss Indictments, p. 1). In asserting that Or. Rev. Stat. § 260.402 was impermissibly overbroad, Petitioners contended that Or. Rev. Stat. § 260.402 was not carefully drafted to meet any important state interest and, instead, penalized a substantial amount of constitutionally-protected speech. (*Id.* at pp. 14-16).

On May 11, 2005, the Oregon state trial court granted Petitioners' motion and dismissed the indictments. The trial court held that "[Or. Rev. Stat. §] 260.402 violates Article I, section 8 of the Oregon Constitution in that it restrains protected speech and political association." (App., *infra* 2a). The trial court also held that Or. Rev. Stat. § 260.402 violated the First Amendment to the United States Constitution, stating that "[t]he Court grants Defendants' Demurrer/Motion to Dismiss on the ground that [Or. Rev. Stat. §] 260.402 is overbroad, finding that the statute prohibits conduct that is clearly protected by the state and federal constitutions." (*Id.*) The trial court rejected Petitioners' argument under both the state and federal constitutions that Or. Rev. Stat. § 260.402 was void for vagueness. (*Id.*)

3. Proceedings before the Oregon Court of Appeals. As it is permitted to do pursuant to Or. Rev. Stat. § 138.060 (2010), the State filed appeals from the trial court's dismissal of the indictments

against Petitioners. The Oregon Court of Appeals consolidated the State's three appeals. The State contended that Or. Rev. Stat. § 260.402 did not violate Oregon's free speech guarantees and, in addition, did not violate the First Amendment. (Appellants Brief, pp. 18-19). The case was argued and submitted to a three-judge panel of the Oregon Court of Appeals on May 29, 2007. On September 4, 2008, approximately 15 months after oral argument, the case was taken *en banc* by the Oregon Court of Appeals. On January 7, 2009, the Court of Appeals issued its opinion. *State of Oregon v. Moyer*, 200 P.3d 619 (Or. Ct. App. 2009) (App., *infra* 4a-45a.)

The Court of Appeals was fractured in its constitutional analysis. Six of the Court's ten judges agreed, albeit for differing reasons resulting in three separate opinions, that Or. Rev. Stat. § 260.402 did not violate Article I, section 8, of the Oregon Constitution while four judges joined in dissent and concluded that the statute in fact violated Oregon's free speech guarantees. (App., *infra* 4a-45a). The six judges who found no state constitutional violations were compelled to rule upon the Petitioners' federal constitutional claims.[5] Without any consideration of whether Or. Rev. Stat. § 260.402 could be applied to constitutionally protected speech or whether it was narrowly tailored to reach the harm to which it was directed, the majority held that that the statute did not violate the First Amendment solely on the basis that this Court had upheld a federal campaign disclosure law from constitutional attack in *Buckley v. Valeo*, 424 U.S. 1, 82 (1976). (App., *infra* 22a-23a). The Oregon

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[5] Because the four dissenting judges would have disposed of Petitioners' constitutional claims on state law grounds, they did not need to address Petitioners' federal constitutional claims.

Court of Appeals thus held as follows: "If a law that requires disclosure of a contributor's identity does not offend First Amendment guarantees, we do not understand how a law that merely requires that such disclosures be truthful does. We conclude that the trial court erred in ruling that [Or. Rev. Stat. §] 260.402 violates the First Amendment." *Id.* Based on that holding, the Oregon Court of Appeals reversed the trial court's dismissal of the indictments.

4. Proceedings before the Oregon Supreme Court. Petitioners filed a petition for review with the Oregon Supreme Court, and the Oregon Supreme Court granted review. In their briefing to the Oregon Supreme Court, Petitioners contended that Or. Rev. Stat. § 260.402 was unconstitutionally overbroad under both Article I, section 8, of the Oregon Constitution and the First Amendment because it "criminalizes contributions that may be the product of inadvertence, mistake, neglect, ignorance of the law's requirements or other mental states inconsistent with any intent to deceive the electorate." (Petitioners' Joint Brief on the Merits, pp. 44-45). Petitioners further contended that the statute was unconstitutionally overbroad because it "criminalizes speech which is completely immaterial to the electorate and causes no harm." (*Id.*)

The State responded to Petitioners' overbreadth argument by suggesting that a limiting construction by the Oregon Supreme Court would solve any infirmity. Thus, while contending that no intent element was required, the State argued in the alternative that, "if [Or. Rev. Stat. §] 260.402 can be constitutional only if it requires the state to prove that a person who made a false-name contribution *intended* to deceive a voter or a campaign, this court should

read that intent element into the statute." (Brief on the Merits of Respondent on Review, p. 29 (emphasis in original)). Similarly, the State argued that, "even if the statute were overbroad because it reaches campaign contributions that do not trigger reporting requirements, this court easily could narrow the statute consistent with legislative intent." (*Id.* at p. 31). Thus, the State suggested that "the court should announce only that [Or. Rev. Stat. §] 260.402 is unconstitutional as applied to contributions that do not, either solely or in aggregate with the true contributor's other donations, meet that public reporting threshold." (*Id.*)

On April 29, 2010, the Oregon Supreme Court, in a unanimous opinion, affirmed the judgment of the Oregon Court of Appeals and concluded that Or. Rev. Stat. § 260.402 violated neither the Oregon nor the United States Constitutions. *State of Oregon v. Moyer*, 230 P.3d 7 (Or. 2010) (App., *infra* 46a-74a). In reaching that conclusion, the court decided that the Oregon Legislative Assembly enacted Or. Rev. Stat. § 260.402 to prevent campaign contributors from defrauding or misleading the electorate about the source of campaign contributions. (App., *infra* 68a). Notably, however, the Oregon Supreme Court upheld the statute as constitutional even though it declined to find that the statute contained any intent element: either proof of an intent to defraud or mislead—or, indeed, any intent *at all* to make a misrepresentation about the source of campaign contributions. (App., *infra* 67a). The court stated that "a statute that prohibits fraud on the electorate need not include an intent element to come within a historical exception" to free speech guarantees. (App., *infra* 67a).

In evaluating Petitioners' state and federal overbreadth challenges, the Oregon Supreme Court declined to engage in any narrowing construction of Or. Rev. Stat. § 260.402 either by limiting its reach to only knowing or intentionally deceptive representations regarding the source of the contributed funds or by imposing criminal liability only if the contribution, alone or in the aggregate, exceeded the amount required to be reported by the candidate or political committee. (App., *infra* 68a-70a). Rather than apply any narrowing construction, the Oregon Supreme Court concluded that Or. Rev. Stat. § 260.402 was facially constitutional and that it need not consider whether any knowing or intentional *mens rea* requirement should be imposed. (App., *infra* 67a, n.9). Thus, under the Oregon Supreme Court's reasoning, the disclosure requirements of Or. Rev. Stat. § 260.402 do not offend the First Amendment even if the statute criminalizes inadvertent or unknowing misstatements about donor identity, no matter how small the amount of the donation.

REASONS FOR GRANTING THE PETITION

Campaign contribution disclosure requirements long have been critical features of both state and federal campaign finance laws. In recent years, disclosure requirements have assumed even greater importance as various state and federal legislative attempts to limit campaign contributions and expenditures have been found to be unconstitutional. *See, e.g., Citizens United v. Fed. Election Comm'n*, __ U.S. __, 130 S. Ct. 876 (2010) (invalidating federal ban on corporate independent expenditures); *Randall v. Sorrell*, 548 U.S. 230 (2006) (invalidating expenditure and contribution limits in Vermont's campaign finance statute). And the importance of disclosure

requirements is only likely to grow. That is so because this Court has recognized that "disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption . . . ." *Buckley*, 424 U.S. at 68.

This case presents an important test to the constitutional limits of campaign contribution disclosure requirements. At issue is whether the First Amendment permits a state to impose felony criminal penalties for unknowing and immaterial violations of campaign contribution disclosure requirements that are committed by donors to political candidates and ballot measures. The Oregon Supreme Court upheld such a statute, appearing to view campaign disclosure requirements as imposing little burden on speech and no constitutional difficulties even when those requirements criminalize misstatements about donor identity without any *mens rea* requirement.

But the Oregon Supreme Court's decision directly conflicts with this Court's First Amendment precedents in two significant ways. First, the Oregon Supreme Court failed to follow this Court's "exacting scrutiny" test for evaluating campaign disclosure requirements. *Buckley*, 424 U.S. at 64-65. Second, the Oregon Supreme Court failed to conduct an appropriate overbreadth inquiry as required by this Court's First Amendment jurisprudence, an inquiry that requires consideration of various factual scenarios that might not necessarily apply to the defendant's conduct but which demonstrate that the law applies to constitutionally protected speech. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (in applying the overbreadth doctrine, this Court "has altered its traditional rules of standing to permit—in

the First Amendment area—attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity" (internal quotations and citations omitted)).

This Court has insisted that campaign disclosure requirements must survive the "exacting scrutiny" standard to satisfy free speech protections under the First Amendment. In applying the "exacting scrutiny" standard applicable to campaign disclosure requirements, this Court expressly has recognized the potential that such requirements have "for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 66. The Oregon Supreme Court's decision does not apply "exacting scrutiny" and, instead, appears to approve campaign disclosure requirements as constitutional in all applications without any limiting analysis.

Similarly, by declining to decide whether Or. Rev. Stat. § 260.402 could be applied to completely inadvertent conduct, the Oregon Supreme Court abdicated its role to determine whether the statute's broad terms proscribe clearly protected speech and, by so doing, seriously chill the exercise of free speech. *See Broadrick*, 413 U.S. at 612-13 ("departure from traditional rules of standing" is justified by the "harm to society" caused by the "inhibitory effects of overly broad statutes").

If allowed to stand—and if followed by other jurisdictions—the Oregon Supreme Court's decision will substantially infringe on constitutionally-protected speech and will chill public participation in elections. The Oregon Supreme Court's decision also demonstrates that further guidance from this Court is

needed to illuminate the constitutional limits of campaign disclosure requirements. The petition for writ of certiorari should be granted to decide these important questions.

I. The Oregon Supreme Court's Decision Conflicts with the First Amendment Precedents of this Court Regarding Exacting Scrutiny of Campaign Disclosure Laws.

As a general matter, this Court has recognized that campaign disclosure laws may under certain circumstances serve important governmental interests sufficient to justify the burdens that such laws impose on the exercise of First Amendment rights. Among other things, this Court has explained that "disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office." *Buckley*, 424 U.S. at 66 (quotations and footnote omitted). Disclosure requirements also may serve to "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 67. Finally, disclosure requirements often "are an essential means of gathering the data necessary to detect violations . . . ." *Id.*

Notwithstanding the legitimacy of those governmental interests, however, this Court has instructed that campaign disclosure requirements are constitutional only if those requirements are narrowly tailored to meet important governmental interests. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (in striking down state statute which required disclosure of the names and addresses of the authors of campaign literature, the Court stated that

"we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly drawn to serve an overriding state interest"). In imposing that requirement, this Court has "repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64. Thus, in *Buckley*, this Court stated:

> It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who might otherwise contribute. In some instances, disclosure may even expose contributors to harassment or retaliation. These are not insignificant burdens on individual rights, and they must be weighed carefully against the interests which Congress sought to promote by this legislation.

Id. at 68.

In view of these concerns, this Court has instructed that disclosure laws "must survive exacting scrutiny" to be constitutional under the First Amendment. *Id.* at 64. The "exacting scrutiny" standard means that the government has the burden to show that the law bears a "substantial relation" to an important governmental interest. *Id.* (internal quotation marks and citation omitted). That heightened degree of scrutiny is required "even if any deterrent effect on the exercise of First Amendment rights arises . . . indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Id.* at 65.

This Court has additionally recognized that, "[t]o withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the

actual burden on First Amendment rights." *Doe v. Reed*, __ U.S. __, 130 S. Ct. 2811, 2010 U.S. LEXIS 5256, *17 (2010), quoting *Davis v. FEC*, __ U.S. __, 128 S. Ct. 2759, 2775 (2008). That analysis requires a balancing of interests to determine whether "the statute burdens any one interest in a manner out of proportion to the statute's salutary effects upon the others." *Doe*, 2010 U.S. LEXIS 5256 at *27 (Breyer, J., concurring).

The Oregon statute at issue here fails both formulations. It is not narrowly drafted to focus in a laser-like manner on the harm to which it is apparently directed, defrauding the electorate. Rather, it captures within its ambit both intentionally deceitful and completely inadvertent misattribution of the source of even the smallest campaign contributions. And its burden, the threat of imprisonment for up to five years and a fine of up to $125,000, is out of proportion to the conduct that the statute criminalizes.

A campaign disclosure law should be upheld only if it is narrowly tailored to meet the important governmental interests which it is designed to further. *McIntyre*, 514 U.S. at 347. In deciding whether a statute is narrowly tailored to meet the "exacting scrutiny" standard, the terms of the statute—not governmental assurances of narrow application—control. As this Court recently explained, "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *United States v. Stevens*, __ U.S. __, 130 S. Ct. 1577, 1591 (2010).

For example, while in this case the State elected to charge Petitioners with "knowingly" violating Or. Rev. Stat. § 260.402, the Oregon Supreme Court expressly declined to conclude that the statute

contained any *mens rea* requirement at all, leaving open the possibility that the statute could be applied to unknowing and inadvertent conduct in the future. (App., *infra* 67a). Thus, the Oregon Supreme Court stated that "a statute that prohibits fraud on the electorate need not include an intent element to come within a historical exception" to free speech guarantees and that it was "not presented in this case" with the question of "whether it would be permissible "to punish a contributor for inadvertently making a contribution in the name of another person." (App., *infra* 67a, n.9).[6]

Furthermore, the Oregon Supreme Court refused to accept the State's invitation to place a narrowing construction on Or. Rev. Stat. § 260.402 by limiting its reach to only knowing or intentional misrepresentations about donor identity. (App., *infra* 67a). *See, e.g., Staples v. United States*, 511 U.S. 600, 606 (1994) ("offenses that require no *mens rea* generally are disfavored"). Instead, even in the absence of such a construction, the Oregon Supreme Court concluded that Or. Rev. Stat. § 260.402 was facially constitutional even if the statute imposed criminal liability on wholly inadvertent and unknowing political contributions which would not, in any event, be reportable to the electorate by the candidate or political committee.[7]

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[6] While these statements were made in the course of the court's state constitutional analysis, they clearly bear on Petitioners' federal constitutional claims as well.

[7] The Oregon Supreme Court could have construed Or. Rev. Stat. § 260.402, a statute which is outside of Oregon's Criminal Code, to require a culpable mental state. *See* Or. Rev. Stat. § 161.095(2) (2010) (setting forth the general rule that a "person is not guilty of an offense unless the person acts with a culpable

The Oregon Supreme Court's failure to engage in a narrowing construction regarding either intent or materiality is crucial because this Court accepts as binding the highest state court's interpretation of state law. *R.A.V. v. St. Paul*, 505 U.S. 377, 381 (1992). *See also New York v. Ferber*, 458 U.S. 747, 769 (1982) (while a federal court dealing with a federal statute challenged as overbroad, "should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction," a state court is free to do the same with a state statute and the "state court's construction is binding on us"). In fact, this Court has recognized that *only* the state court can offer such a limiting construction to save a state or local statute from facial invalidity due to overbreadth. *Gooding v. Wilson*, 405 U.S. 518, 520 (1972). Thus, where, as in this case, the state court has failed to give a state statute a narrowing construction, this Court must decide the overbreadth claim based on the plain meaning of the statutory

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mental state with respect to each material element of the offense that necessarily requires a culpable mental state"); Or. Rev. Stat. § 161.105(1)(b) (2010) (for offenses defined by statutes outside the Oregon Criminal Code, a culpable mental state is not required if the statute "clearly indicates a legislative intent to dispense with any culpable mental state requirement for the offense or for any material element thereof"). Instead, the Oregon Supreme Court declined to hold that inadvertent and unknowing conduct could not form the basis of a conviction under Or. Rev. Stat. § 260.402. (App., *infra* 67a, n.9) The court thus declined to identify any culpable mental state. *See, e.g.*, *State v. Rutley*, 171 P.3d 361, 365-66 (Or. 2007) (court declined to hold that a statute outside the Oregon Criminal Code criminalizing drug sales within 1000 feet of a school required a culpable mental state); *State v. Miller*, 788 P.2d 974, 978 (Or. 1990) (court declined to hold that driving under the influence statute which was outside the Oregon Criminal Code required a culpable mental state).

language before it. *See Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (where the state court failed to offer a narrowing construction of a local ordinance, this Court is "relegated, at best, to the words of the ordinance itself").

Here, this Court is left with a statute that contains no express or judicially implied *mens rea* requirement. Hence, Or. Rev. Stat. § 260.402 authorizes the imposition of felony criminal sanctions against political donors for making otherwise lawful campaign contributions even when the donor has no active involvement or even knowledge about misstatements of his or her identity. Those criminal sanctions may be imposed against political donors who make inadvertent misstatements or who are unaware that others have misreported their identity or the amount of their contribution. For example, suppose an individual gave a friend who was off to a campaign fundraiser twenty dollars to contribute. If the friend simply forgot to tell the recipient the source of the funds, both individuals would be in violation of the statute and would be subject to felony criminal penalties.[8] Or. Rev. Stat. § 260.402 thus imposes strict liability.

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[8] Numerous examples can be offered to demonstrate that Or. Rev. Stat. § 260.402 creates criminal liability even where there is no criminal intent. For example, a parent who seeks to instill civic virtues in his or her children by giving them each a sum of money so they can make a contribution to the candidate or cause of their choice would be in technical violation of the statute, as would the children. Similarly, suppose a restaurant owner set out a donation jar for a local school board candidate. If the restaurant owner collected less than fifty dollars and simply donated the funds without identifying the source of every penny in the donation jar, both the owner and any donors would be in violation of the statute.

The Oregon Supreme Court's decision also is troubling because it justifies severe criminal penalties against individuals whose "false name" contributions are so small, either individually or in the aggregate, that they would not otherwise be reportable under Oregon law by the candidate or political committee. Ignoring the putative purpose of Oregon's disclosure laws which is to inform the electorate of the identity of those who make contributions in excess of $50 (now $100), the Oregon Supreme Court instead focused on the perceived benefit to the candidate or political committee in obtaining accurate reports regarding even smaller individual or aggregate contributions. (App., *infra* 70a). Thus, the Oregon Supreme Court construed the statute to impose criminal liability even if one cent were contributed in a name other than the name of the person who provided the funds, despite the fact that candidates and political committees are not required to report such sums and the Oregon electorate has no demonstrable interest in being informed of them.

Or. Rev. Stat. § 260.402 is not substantially related to its purpose of misleading the electorate about the source of campaign contributions because it is not limited to the harms it was designed to prevent. Hence, it does not survive the exacting scrutiny that this Court places on campaign disclosure laws.

II. The Oregon Supreme Court's Decision Conflicts with this Court's Precedents Regarding the First Amendment's Overbreadth Doctrine.

For many of the same reasons that the Oregon Supreme Court's decision violates this Court's precedents regarding exacting scrutiny, it violates this Court's precedents regarding overbreadth under the

First Amendment. Thus, the Oregon Supreme Court, upheld, without a narrowing construction, a law that went much further than needed to address the harm to which it was directed, fraud against the electorate.

Petitioners' First Amendment challenge to Or. Rev. Stat. § 260.402 was a facial challenge under the overbreadth doctrine of the First Amendment. The doctrine provides that a law is facially unconstitutional if the law "punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep[.]" *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (internal quotation marks and citations omitted). The foundation of the doctrine is that "the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick*, 413 U.S. at 611-12.

The overbreadth doctrine arises "out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions." *Hicks*, 539 U.S. at 119. A showing of overbreadth "suffices to invalidate *all* enforcement of that law"—even if enforcement would not be unconstitutional under the particular circumstances of the case at issue—"until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression[.]" *Id.* (emphasis in original; internal quaotation marks and citations omitted). Thus, the overbreadth doctrine does not require "that the person making the attack demonstrate

that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Broadrick*, 413 U.S. at 612, quoting *Dombroski v. Pfister*, 380 U.S. 479, 486 (1965). Instead, the doctrine addresses the real concern that "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights by case-by-case litigation, will choose simply to abstain from protected speech," harming themselves and society as a whole, "which is deprived of an uninhibited marketplace of ideas." *Hicks*, 539 U.S. at 119.

The first step in an overbreadth analysis "is to construe the challenged statute" because "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Stevens*, 130 S. Ct. at 1587, quoting *United States v. Williams*, 553 U.S. 285, 293 (2008). Therefore, the Oregon Supreme Court was obligated under this Court's precedents regarding First Amendment overbreadth to determine whether Or. Rev. Stat. § 260.402 applied by its terms, and therefore chilled, a substantial amount of constitutionally protected speech. *Broadrick*, 413 U.S. at 611-12. The Oregon Supreme Court therefore should have considered, and not deferred, the question of whether the statute was applicable to unknowing and inadvertent speech. (App., *infra* 67a n.9).

Instead of engaging in a proper First Amendment overbreadth analysis, however, the Oregon Supreme Court declined to consider the scope of the statute and similarly declined to apply any narrowing construction. Instead, it denied petitioners' First Amendment challenge, apparently based on its understanding that a campaign disclosure statute

like Or. Rev. Stat. § 260.402 imposes little burden even when the statute does not contain any *mens rea* or materiality element. In reaching such a conclusion, the Oregon Supreme Court misunderstood and misapplied this Court's First Amendment precedents and severely discounted the burdens that campaign disclosure requirements impose on constitutionally-protected speech and public participation in elections.

III. Certiorari Is Warranted Because the Oregon Supreme Court's Decision Demonstrates the Need for Immediate Guidance from this Court on the Constitutional Limits to Campaign Disclosure Requirements.

Faced with the Oregon Supreme Court's broad interpretation of Or. Rev. Stat. § 260.402 and its refusal to narrow its application in any manner even despite the State's invitation for it to do so, this Court should accept review to confine Oregon's disclosure law within appropriate constitutional limits.[9] By doing so, the Court can establish a constitutional floor for state election disclosure laws that will protect against the constitutional risks that participants in the electoral process will be "chilled" by the risk of severe criminal penalties for even an unknowing misstep. *See Randall*, 548 U.S. at 248 ("where constitutional risks to the democratic electoral process become too great," the Court must "recognize the existence of some lower bound" below

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[9] The American Civil Liberties Union in an amicus brief to the Oregon Supreme Court also urged the court to limit the application of Or. Rev. Stat. § 260.402 to speech that was intended to deceive the electorate. (Brief on the Merits of *Amicus Curiae* ACLU Foundation of Oregon, Inc., pp. 4-5).

which the states cannot go in regulating campaign contributions).

In this case, there can be no question that Or. Rev. Stat. § 260.402 restrains political speech in a significant manner by conditioning the right to make a political contribution of even the smallest amount on the accurate disclosure of the name, and presumably the occupation, of the individual who "in truth provides the contribution." This Court long has recognized that political speech is "central to the meaning and purpose of the First Amendment." *Citizens United*, 130 S. Ct. at 892. And contributing money is clearly political speech deserving of constitutional protection. *See Buckley*, 424 U.S. at 14, 22 (statutory limits on contributions "operate in an area of the most fundamental First Amendment activities" and also "impinge on protected associational freedoms").

As other courts have recognized, nothing is "inherently wrong in making a political contribution" and certainly the making of such a contribution is not *malum in se* even if the contribution misstates the identity of the donor. *State v. Azneer*, 526 N.W.2d 298, 300 (Iowa 1995). Such misstatements may result from inadvertent errors, oversights, or innocent misunderstandings. Misstatements about donor identity also may be made by the person reporting the contribution without the donor even having knowledge about the misstatement. In addition, a donor may have many legitimate and honest motives for making a political donation in another person's name. For example, a donor may make a political donation in another person's name as a gift to that person or as a way of honoring that person. A donor also may take such an approach to avoid political

retaliation, to maintain anonymity, or to avoid solicitation for additional donations.

Notwithstanding those legitimate reasons for donor identity misstatements, Or. Rev. Stat. § 260.402 criminalizes such political donations, going well beyond the statute's "legitimate sweep." *Hicks*, 539 U.S. at 118-19. The lack of any *mens rea* requirement in Or. Rev. Stat. § 260.402—coupled with the severity of its criminal sanctions—has the potential to have a serious chilling effect on protected First Amendment speech. Faced with the possibility of criminal sanctions for inadvertent or unknowing misstatements about identity, political donors may be reluctant to make political donations for fear that errors or misstatements in the reporting process could subject the donors to felony criminal prosecution. Small donors in particular are likely to be deterred from exercising their First Amendment rights because Or. Rev. Stat. § 260.402 criminalizes misstatements about donor identity without any regard to the size of the donation.

The lack of any *mens rea* requirement also prevents Or. Rev. Stat. § 260.402 from being narrowly tailored to serve the important government interests identified in *Buckley*. One of the primary governmental interests for campaign disclosure requirements is preventing election corruption. In this case, the Oregon Supreme Court concluded that Or. Rev. Stat. § 260.402 was, in fact, intended to prevent the perpetration of a fraud on the electorate. But without any *mens rea* requirement—not even a requirement that the misstatement be knowing—Or. Rev. Stat. § 260.402 criminalizes innocent political expression under the First Amendment that neither is intended as fraud nor results in fraud. *See, e.g.*,

McIntyre, 514 U.S. at 351 (court refused to uphold law forbidding anonymous campaign literature against state's claim that the statute prevented fraud where "the prohibition encompassed documents that are not even arguably false or misleading").

Moreover, because Or. Rev. Stat. § 260.402 applies to political donations of any size, it criminalizes misstatements about donor identity even when the donation is so small that it is not subject to any reporting requirements. Although the Oregon Supreme Court correctly pointed out that information about voter identity may help to determine whether multiple small donations together aggregate to a reportable donation, less intrusive and burdensome means exist to achieve that same goal—such as criminalizing knowingly misattributed contributions only when those contributions, either individually or collectively, exceed reporting limits. Certainly, it is easy to conceive of how Or. Rev. Stat. § 260.402 could be narrowly tailored to meet governmental interests to curb election corruption, and it is equally easy to see how it does not currently satisfy that standard.[10]

The constitutional question presented by this case is also not isolated. Although this case concerns an Oregon statute, federal law and the laws of most states have similar statutes requiring the truthful disclosure of the identity of the individual who actually provides the campaign contribution. *See, e.g.*, 2 U.S.C. § 441f; Cal. Gov. Code § 84301 (2010);

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[10] Thus, under federal law, 2 U.S.C. § 437g(d)(1)(D), punishment in the form of imprisonment is imposed for violating the "truthful reporting" requirements of 2 U.S.C. § 441f only if the misreported amount is more than $10,000 in a calendar year (two years), which is then increased to five years if the amount misreported reaches $25,000 in a calendar year.

Wash. Rev. Code § 42.17.120 (2010). These laws fall into three major categories. Some contain an express intent element which must be proven to establish a violation of the statute. *See* Tex. Elec. Code § 253.001(a) (2010) ("A person may not knowingly make or authorize a political contribution in the name of or on behalf of another unless the person discloses in writing to the recipient the name and address of the person actually making the contribution in order for the recipient to make the proper disclosure."). In many other states, the statute imposing the requirement for disclosure is silent as to the culpable mental state required but a separate criminal penalty provision applicable to the disclosure statute expressly does so. *See, e.g.*, 2 U.S.C. § 437g (d)(1)(D) (only those who "knowingly and willfully" violate 2 U.S.C. § 441f are subject to criminal penalties); N.Y. Elec. Law § 14-126 (2010) (any person who "knowingly and willfully" violates the disclosure requirements contained in N.Y. Elec. Law § 14-120 (2010) is guilty of a misdemeanor); Kan. Stat. Ann. § 25-4171(a) (2009) ("intentionally" violating the proscription against making a contribution in the name of another person contained in Kan. Stat. Ann. § 25-4154(a) (2009) is a Class A misdemeanor).

But importantly for this case, there are several other states like Oregon where criminal liability is imposed upon contributors under statutes which do not contain any *mens rea* requirements. *See, e.g.*, Neb. Rev. Stat. § 49-1473 (2010) (a contribution made in a false name is punishable as a class III misdemeanor); N.H. Rev. Stat. § 664:21(V) (2010) (a person who makes a contribution in a name other than that of the donor in violation of N.H. Rev. Stat. § 664:4(V) (2010) is guilty of a misdemeanor); N.D. Cent. Code § 16.1-10-08 (2010) (a person who contributes in any

name other than that of the person who supplies the money in violation of N.D. Cent. Code § 16.1-08.1-03.3 (2010) commits a misdemeanor); Pa. Conn. Stat. Ann. § 2375 (2010) (a person in violation of the requirement contained in Pa. Conn. Stat. Ann. § 3254 (2010) that a person must make a contribution only in his own name is guilty of a misdemeanor). Thus, a decision by this Court that imposition of criminal liability without a statutory *mens rea* requirement violates the First Amendment will have far-reaching effect and will impact the administration of the campaign finance laws in several other states.

The importance of requiring some level of criminal intent before imposing criminal liability cannot be overestimated. In fact, some states clearly recognize this and have elected to only impose civil, and not criminal, liability for unknowing violations. *See, e.g.*, Idaho Code § 67-6625 (2010) (where violation of the proscription contained in Idaho Code § 67-6614 (2010) against concealment of the source of a contribution is "willful and knowing," it is punishable as a misdemeanor; otherwise, a violation is punishable by civil fines only); Okla. Stat. tit. 21, § 187.1 (2010) (person making a campaign contribution through an intermediary or conduit is guilty of a crime if the violation is committed "knowingly and willfully," but otherwise only civil penalties are available for non-willful and "inadvertent" violations under Okla. Stat. tit. 74, chapter 62, Appx., § 257:1-1-11(a)); Wash. Rev. Code § 42.17.395(4) (2010) (only civil penalties are available for violation of Washington's proscription against making campaign contributions "in such a manner as to conceal the identity of the source of the contribution" under Wash. Rev. Code § 42.17.120 (2010)). These states appear to recognize, as Oregon does not, that a technical violation of the

reporting statute cannot be met by severe criminal penalties and remain consistent with First Amendment protections.

CONCLUSION

Oregon imposes extremely severe penalties of up to five years in prison and up to $125,000 in fines for even one inadvertent and immaterial violation of Or. Rev. Stat. § 260.402. Such criminal penalties have the potential to seriously chill participation in election campaigns and thus seriously infringe upon First Amendment rights. This Court should grant the petition for writ of certiorari in this case to define reasonable constitutional limitations on the scope of Oregon's campaign disclosure statute and similar statutes in other states.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE CIRCUIT COURT OF
THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

[Filed May 12, 2005]

No. 04-09-35104 DA 2023278-1
04-09-35105 DA 2023278-2
04-09-35106 DA 2023278-3

STATE OF OREGON,
Plaintiff,

v.

THOMAS PAUL MOYER, VANESSA COLLEEN KASSAB
AKA VANESSA STURGEON, AND SONJA R. TUNE,
Defendants.

ORDER GRANTING DEFENDANTS' DEMURRER/MOTION TO DISMISS

This matter came before the Court for oral argument on March 29, 2005 on defendants' jointly filed Demurrer/Motion to Dismiss the two-count indictment charging violations of ORS 260.402. Moyer and Sturgeon demurred to and moved to dismiss Count 1, and Moyer and Tune demurred to and moved to dismiss Count 2. The defendants demurred on the grounds that the facts stated do not constitute an offense (ORS 135.630(4)), and that the accusatory instrument contains matters which, if true, would constitute a legal bar to the action

(ORS 136.630(5)). The Demurrer/Motion to Dismiss attacked the constitutionality of ORS 260.402 in that it restrains speech and political association in violation of Article I, §§ 8 and 26 of the Oregon Constitution, is vague and overbroad in violation of Article I, §§ 20 and 21 of the Oregon Constitution, and for those same reasons is defective under the First and Fourteenth Amendments to the United States Constitution as well. Finally, defendants claim the indictment violates defendants' due process under the Fourteenth Amendment to the United States Constitution because it fails to allege an intentional violation of a known legal duty.

The Court denies defendants' claim that unless ORS 260.402 is read to require an intentional violation of a known legal duty, it is unconstitutional in violation of the Fourteenth Amendment to the United States Constitution.

The Court also denies defendants' claim that ORS 260.402 is vague under either the state or the federal constitution.

The Court grants Defendants' Demurrer/Motion to Dismiss on the ground that ORS 260.402 is overbroad, finding that the statute prohibits conduct that is clearly protected by the state and federal constitutions.

The Court also grants defendants' Demurrer/Motion to Dismiss on the ground that ORS 260.402 violates Article I, section 8 of the Oregon Constitution in that it restrains protected speech and political association.

DATED this 11th day of May, 2005.

/s/ Hon. John A. Wittmayer
Hon. John A. Wittmayer

APPENDIX B

IN THE CIRCUIT COURT OF
THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

[Filed May 12, 2005]

No. 04-09-35104 DA 2023278-1
04-09-35105 DA 2023278-2
04-09-35106 DA 2023278-3

STATE OF OREGON,
Plaintiff,

v.

THOMAS PAUL MOYER, VANESSA COLLEEN KASSAB
aka VANESSA STURGEON, and SONJA R. TUNE,
Defendants.

JUDGMENT

Defendant Moyer's Demurrer/Motion to Dismiss to Counts 1 and 2 of the indictment is allowed, and Counts 1 and 2 are dismissed as to defendant Moyer. Defendant Sturgeon's Demurrer/Motion to Dismiss Count 1 of the indictment is allowed and Count 1 is dismissed as to defendant Sturgeon. Defendant Tune's Demurrer/Motion to Dismiss Count 2 of the indictment is allowed and Count 2 is dismissed as to defendant Tune.

DATED this 11th day of May, 2005.

/s/ Hon. John A. Wittmayer
Hon. John A. Wittmayer

APPENDIX C

IN THE COURT OF APPEALS OF
THE STATE OF OREGON

MULTNOMAH COUNTY CIRCUIT COURT
040935104; A128796 (Control)

STATE OF OREGON,
Plaintiff-Appellant,

v.

THOMAS PAUL MOYER,
Defendant-Respondent.

MULTNOMAH COUNTY CIRCUIT COURT
040935105; A128797

STATE OF OREGON,
Plaintiff-Appellant,

v.

VANESSA COLLEEN STURGEON,
aka Vanessa Sturgeon,
aka Vanessa Colleen Kassab,
Defendant-Respondent.

MULTNOMAH COUNTY CIRCUIT COURT
040935106; A128798

STATE OF OREGON,
Plaintiff-Appellant,

v.

SONJA R. TUNE,
Defendant-Respondent.

En Banc

John A. Wittmayer, Judge.

Argued and submitted May 29, 2007.

Timothy. A. Sylwester, Assistant Attorney General, argued the cause for appellant. On the briefs were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

Michael T. Garone and Janet Lee Hoffman argued the cause for respondents. With them on the joint brief were David Axelrod and Schwabe, Williamson & Wyatt, P.C., Nicholas Cropp and Law Offices of Janet Lee Hoffman, and Ronald Hoevet and Hoevet, Boise & Olson, P.C.

Before Brewer, Chief Judge, and Edmonds, Landau, Haselton, Armstrong, Wollheim, Schuman, Ortega, Rosenblum, and Sercombe, Judges.

LANDAU, J.

Reversed and remanded.

Brewer, C.J., concurring.

Schuman, J., concurring.

Sercombe, J., dissenting.

LANDAU, J.

Defendants were charged with violating ORS 260.402 (2003),[1] which provides, in essence, that it is unlawful to lie about the source of political campaign contributions. Defendants demurred to the indictment on the ground that the statute, on its face, violates various provisions of the state and federal constitutions, in particular, the free speech guarantees of Article I, section 8, of the Oregon Constitution and the First Amendment to the United States Constitution. The trial court allowed the demurrer on the ground that the statute violates both state and federal constitutional guarantees of freedom of expression. The state appeals, arguing that the trial court erred in concluding that the statute is unconstitutional. We agree with the state and reverse and remand.

I. FACTS

Because this appeal comes to us on the allowance of a demurrer, the only relevant facts are those alleged in the indictment. *State v. Illig-Renn*, 341 Or 228, 230 n 2, 142 P3d 62 (2006). The first count of the indictment in this case stated:

> "The said defendants **THOMAS PAUL MOYER** and **VANESSA COLLEEN KASSAB**, on or about May 16, 2003, in the County of Multnomah County, State of Oregon, did unlawfully and knowing[ly] make a contribution to a candidate, in relation to his campaign for election to public office, in a name other than * * * that of the person who in truth provided the contribution,

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[1] Unless otherwise noted, all references to ORS chapter 260 in this opinion are to the 2003 version, which is the version that applies to this case.

> to-wit: by making a contribution of $2,500 in the name of **'VANESSA KASSAB'** to Jim Francesconi in support of his campaign for the Mayor of Portland, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon[.]"

(Boldface and uppercase in original.) The second count asserted the same charge against defendants Moyer and Tune for a $2,000 contribution in the name of "Sonja Tune."

Defendants demurred and moved to dismiss the indictment, contending that ORS 260.402, the statute that defines the offense, is, on its face, an unlawful restraint on speech and political association and is also impermissibly vague and overbroad, all contrary to limitations on legislation contained in the state and federal constitutions. The trial court allowed the demurrer. The trial court explained that it agreed with defendants that the statute violates the state and federal guarantees of freedom of expression. According to the trial court, "political contributions are clearly speech," and the challenged statute equally clearly regulated it without the safe harbor of a historical exception to the protections afforded by constitutional free speech guarantees. The trial court disagreed with defendants that the statute is unconstitutionally vague.

On appeal, the state argues that the trial court erred in concluding that ORS 260.402 is facially unconstitutional under Article I, section 8, of the Oregon Constitution. The state also asserts that ORS 260.402 is constitutional under the First Amendment to the United States Constitution under the principles articulated in *Buckley v. Valeo*, 424 US 1, 96 S Ct 612, 46 L Ed 2d 659 (1976).

Defendants submit that ORS 260.402 violates Article I, section 8, and the First Amendment because it makes it a crime to engage in speech of a particular content—a political contribution in a false name—and because the statute cannot be narrowed to restrict only the effects of conduct not protected under either Article I, section 8, or the First Amendment. Moreover, defendants cross-assign error and contend that the statute is too vague to be enforced under either the federal or state constitution.

II. ANALYSIS

We begin with a brief description of the challenged statute and the framework of election law of which it is an integral part. We then turn to an analysis of defendants' state constitutional claims, before turning to defendants' federal constitutional contentions. *See MacPherson v. DAS*, 340 Or 117, 125-26, 130 P3d 308 (2006) (Oregon courts analyze state constitutional challenges before turning to federal constitutional challenges).

A. *Oregon election campaign finance statutes*

ORS 260.055(1) provides that all political candidates and treasurers for political committees must "keep detailed accounts" of contributions received and expenditures made by or on behalf of the candidate or the political committee. At various points during an election cycle, the candidates and political committees are required to file statements of such contributions and expenditures with the appropriate "filing officer." *E.g.*, ORS 260.058 (statements of candidates and principal campaign committees for elections other than general elections); ORS 260.063 (statements of political committees other than principal campaign committees for elections other than general

elections); ORS 260.068 (statements of candidates and principal campaign committees for general elections); ORS 260.073 (statements of political committees other than principal campaign committees for general elections); ORS 260.076 (statements of legislative officials or candidates for legislative office).

Any contribution from a person or campaign committee "that contributed an aggregate amount of more than $50" must be listed in the statement individually, along with the contributor's name, address, and occupation. ORS 260.083(1)(a). "The statement may list as a single item the total amount of other contributions, but shall specify how those contributions were obtained." *Id.*

The filing officer is required to review the statements of contributions and expenditures and notify candidates or committees who have failed to file statements as required or who have failed to file statements that comply with all statutory requirements. ORS 260.205; ORS 260.215. Failure to file a proper statement of contributions and expenditures can lead to a court order compelling such a proper filing, ORS. 260.225(1); imposition of civil penalties, ORS 260.232; and removal of the candidate or measure from the ballot, ORS 260.241(2).

The filing officer is then required to preserve the filed statements and to prepare for each election a summary that is to be made available to the public. ORS 260.255(1), (2). The summaries are required to include a list of "all expenditures that total $100 or more to any one person and a list of all contributions of more than, $50." ORS 260.255(3).

The source of a candidate's or a committee's information about contributions is the contributor himself

or herself. Obviously, the linchpin of the system of reporting contributions is the accuracy of the information reported to the candidate or committee; it is that information that provides the basis for the candidate's or the committee's statements to the filing officer. As a result, the legislature enacted what is now codified at ORS 260.402, making it a criminal offense for a person to provide false information about the source of campaign contributions to a candidate or committee. Specifically, that statute provide, in part:

> "No person shall make a contribution to any other person, relating to a nomination or election of any candidate or the support or opposition to any measure, in any name other than that of the person who in truth provides the contribution."

As defined by ORS 260.005(3)(a), "contribution" includes:

> "(A) The payment, loan, gift, forgiving of indebtedness, or furnishing without equivalent compensation or consideration, of money, services other than personal services for which no compensation is asked or given, supplies, equipment or any other thing of value:
>
> "(i) For the purpose of influencing an election for public office or an election on a measure, or of reducing the debt of a candidate for nomination or election to public office or the debt of a political committee; or
>
> "(ii) To or on behalf of a candidate, political committee or measure; and
>
> "(B) Any unfulfilled pledge, subscription, agreement or promise, whether or not legally enforceable, to make a contribution."

Thus, a violation of ORS 260.402 occurs by an actual or promised transfer of money, certain services, or things of value directly or indirectly to a political campaign "in any name other than that of the person who in truth provides the contribution." A false name contribution could occur by a contributor using either someone else's name or someone else's money in the making of the contribution. In either event, the gravamen of the offense is the fact that the contributor is supplying *false information* to the recipient of the contribution. At issue in this case is the constitutionality of the statute that prohibits providing such false information.

B. *Article I, section 8*

1. *The analytical framework*

We begin with the question whether ORS 260.402 violates the free speech guarantee of Article I, section 8, of the Oregon Constitution. That section provides that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for abuse of this right." In *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), the Supreme Court set out a framework for challenges to the constitutionality of state statutes under that provision. That framework involves first classifying the challenged statute in terms of whether it constitutes a regulation of the content of speech, as opposed to proscribing harmful effects of speech. Then, depending on the classification, the framework requires different types of analysis. *See generally State v. Johnson*, 345 Or 190, 193-94, 191 P3d 665 (2008) (most recent summary of *Robertson* analysis).

If the focus of the challenged statute is the content of speech itself, the statute is unconstitutional "unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Robertson*, 293 Or at 412. The court cited as examples of such "historical exceptions" perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud, "and their contemporary variants." *Id.*

If a law is aimed not at the content of speech but at specific harms or proscribed effects that could be caused by speech, its constitutionality is tested by the breadth of the law or particulars of its application; that is, we must determine whether the statute "appears to reach privileged communication or whether it can be interpreted to avoid such 'overbreadth.'" *Id.* at 418.

Although describing the framework can be accomplished without much difficulty, applying it has proved somewhat more challenging to the courts. In particular, the line between a first-category regulation (one that targets the content of speech) and a second-category regulation (one that targets only the harmful effects of speech) has proved somewhat elusive. It has been stated, for example, that, in order to qualify as a second-category regulation that focuses not on speech but on harmful effects, the "operative text" of the statute must "specify adverse effects." *City of Portland v. Tidyman*, 306 Or 174, 185-86, 759 P2d 242 (1988). On the other hand, it also has been said that, "[e]ven when the statute does not, by its terms, target a harm, a court may infer the harm from context."

Vannatta v. Keisling, 324 Or 514, 536, 931 P2d 770 (1997); *accord State v. Stoneman*, 323 Or 536, 545-47, 920 P2d 535 (1996) (the focus of a statute on harmful effects, if not plainly stated in its text, may nevertheless be inferred from its context and apparent purpose).

In identifying the proper classification of ORS 260.402, we are greatly aided by the fact that the Oregon Supreme Court addressed, in *Vannatta*, if not that particular statute, then at least the general subject of the proper classification of laws pertaining to the regulation of election contributions. In that case, the court addressed the constitutionality of a ballot measure that, among other things, directly limited the amount of political contributions. 324 Or at 517. The court concluded that the contribution limitations violated Article I, section 8. *Id.* at 541. In arriving at that conclusion, the court first addressed whether contributions to political candidates and campaigns are a form of "expression" under the state constitution. *Id.* at 522-24. The court concluded that "*many* political contributions constitute expression." *Id.* at 523 (emphasis added). It is important to emphasize that the court did not say that all contributions constitute expression.[2] Moreover (and more important to this case), the court noted that, even if a particular form of political contributions constitutes

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[2] In a footnote, the court expressly noted the limited nature of its holding:

> "We qualify our statement with the limiting word, 'many,' because there doubtless are ways of supplying things of value to political campaigns or candidates that would have no expressive content or that would be in a form or from a source that the legislature otherwise would be entitled to regulate or prevent."

Vannatta, 324 Or at 522 n 10.

expression, it does not necessarily mean that Article I, section 8, protects it. *Id.* at 522 n 10. It depends, the court said, on the nature of the restriction—in particular, whether the restriction is *on the contribution itself*:

> "If it can be shown that financial contributions and expenditures are the free expression of opinion, laws limiting such activities run afoul of the constitutional protection. But lawmakers might choose to impose requirements distinct from contribution or expenditure limitations (*e.g.*, *requirements of disclosure of financing sources* and the extent of any gift) as well as various sanctions (*e.g.*, civil or criminal penalties, disqualification from the ballot or Voters' Pamphlet, and the like) and their choice may not *necessarily* offend the constitutional requirement."

Id. at 523 (internal quotation marks omitted; first emphasis added, second emphasis in original). In other words, regulations of the contributions or expenditure themselves—limitations on their amounts, for example—are *Robertson* first-category regulations and are unconstitutional unless wholly contained within a well-established historical exception. But regulations that impose requirements "distinct from contribution or expenditure limitations," *Vannatta*, 324 Or at 523—such as disclosure requirements—are treated differently; they are *Robertson* second-category regulations, which do not necessarily offend the constitution, unless they are overbroad.

2. *Application: ORS 260.402 as a second-category statute*

With that in mind, we turn to the statute at issue in this case. ORS 260.402 does not limit contributions

directly. It does not specify how much may or may not be contributed. Nor does it impose any restriction on who may receive the contribution. Under ORS 260.402, *any* person can give *any* amount to *any* political campaign.

The only restriction that the statute imposes is that the person truthfully report the source of the contribution. As such, ORS 260.402 would seem to fall within the sort of reporting requirement that the Supreme Court in *Vannatta* specifically said is *not* a first-category statute, but is, instead a second-category statute that does "not *necessarily* offend" the constitution. 324 Or at 523 (emphasis in original).

At that point, the question becomes whether the statute targets harm that the legislature is entitled to target; said another way, the question is whether the statute "reaches privileged communication and, if it does so more than rarely, then whether a narrowing construction is possible to save it from overbreadth," *State v. Rangel*, 328 Or 294, 299, 977 P2d 379 (1999). In this case, the answer to that question is fairly straightforward. *Vannatta* itself stated that the legislature is entitled to enact election statutes that impose penalties for misleading the public. 324 Or at 544.

The dissent contends that we err in concluding that ORS 260.402 targets harmful effects of speech, and not speech itself. According to the dissent, the statute "is a direct prohibition on a type of speech," namely, a contribution made under a false name. 225 Or App at 104 (Sercombe, J., dissenting). Having identified the focus of the statute as certain types of contributions, the dissent easily concludes that, under *Vannatta*, it is a regulation of speech itself, that is, a *Robertson* first-category statute. The dissent, however, overlooks the fact that, as we have observed, the statute

does not actually impose any limits on contributions themselves, only on the information that is reported by the contributor regarding the source of the contributions. Under *Vannatta*, that is *not* a first-category statute.

The dissent acknowledges what *Vannatta* says in that regard, but insists that we should not read the decision so broadly, because doing so puts it at odds with other cases that require the harmful effects of a statute either to be expressly stated in the wording of the statute or, at the least, necessarily a consequence of violating the statute. In this case, the dissent contends, the violation of ORS 260.402 does not necessarily produce any particular harm because, under current law, a candidate or committee is not required to pass on to filing officials *all* reports of contributions, rather, only total aggregate contributions of more than $50 from a single person. Because no harm flows from the false reporting of the sources of such small contributions, the dissent reasons, the harm cannot fairly be said *necessarily* to flow from the violation of ORS 260.402. 225 Or App 107-08 (Sercombe, J., dissenting).

We are not persuaded. Even assuming, for the sake of argument, that harm must *necessarily* flow from violation of the statute for it to qualify as a second-category statute, it does not logically follow that harm does not necessarily flow from every violation of ORS 260.402.

As we have noted, the Supreme Court has explained that whether a statute targets harmful effects of speech, as opposed to speech itself, is a question of legislative intent. *See, e.g., Stoneman*, 323 Or at 546 (citing *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993)). To ascertain

legislative intent, it is always appropriate to examine prior versions of a statute, *Krieger v. Just*, 319 Or 328, 336, 876 P2d 754 (1994); prior judicial construction of the statute, *State v. Murray*, 343 Or 48, 52, 162 P3d 255 (2007); and other, related statutes, including the legislative histories of those statutes, *Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto*, 322 Or 406, 415-16, 908 P2d 300 (1995), *modified on recons*, 325 Or 46, 932 P2d 1141 (1997); *State v. Stamper*, 197 Or App 413, 420-21, 106 P3d 172, *rev den*, 339 Or 230 (2005).

What is now ORS 260.402 was enacted by the people in 1908 (later known as the Corrupt Practices Act) and prohibited—among many other things (it was an extraordinarily long initiative measure)—falsely reporting the source of a contribution and required candidates to report *all* contributions. The legislative history of that enactment shows that the people were concerned that "the secret use of money to influence elections [is] dangerous to liberty, because [it is] always used for the advantage of individuals or special interests and classes, and never for the common good." Official Voters' Pamphlet, General Election, June 1, 1908, 103. As the Supreme Court observed in *Nickerson v. Mecklem*, 169 Or 270, 277, 126 P2d 1095 (1942), the enactment was adopted "to prevent fraud and insure purity of elections." "People," the court said, "have the right to know—and it is so contemplated by the act—who is spending money and the amount thereof * * *." *Id.* The "evil" that the statute addresses, the court summarized, is concealing the names of election campaign contributors and the amounts that they contribute. *Id.* at 282.

In other words, the harm *necessarily* occurs whenever an individual makes election campaign con-

tributions without reporting accurately who is making the contribution. The people have the right to know *all* contributors and the amounts that they contribute. To the extent that that does not happen, there is harm.

The dissent gets side-tracked by the fact that the legislature later decided that some contributions are so small that it is simply not worth the effort to regulate them, regardless of the harm that results. The people and the legislature, however, are not obligated to regulate the full extent of any harm that they legitimately target. And the fact that the legislature has chosen over the years to exempt from actual reporting the receipt of aggregate contributions in small amounts—originally $5, later raised to $25 and then to $50, and most recently raised again to $100—logically does not mean that the harm in not reporting does not exist. *See* ORS 260.070(4) (1953) ($5); Or Laws 1971, ch 749, § 16 ($25); Or Laws 1995, ch 607, § 87 ($50);. Or Laws 2005, ch 809, § 8 ($100).

3. *Application: ORS 260.402 as a first-category statute*

Even, assuming, for the sake of argument, that the dissent is correct that ORS 260.402 is properly classified as a first-category statute, we are not persuaded that it necessarily follows that the statute runs afoul of the free speech guarantee of Article I, section 8. As we have noted, under *Robertson* and subsequent cases, such a statute is unconstitutional unless wholly contained within a historical exception. *Robertson*, 293 Or at 412. It bears some emphasis that it is not required that the statute under examination match precisely, element by element, a historical exception. *Robertson* speaks of historical

exceptions in terms of nineteenth-century offenses "and their contemporary variants." *Id.* By definition, there can be no such variant if the analysis requires a precise matching of elements. *Robertson* itself explains that Article I, section 8, "locks neither the powers of lawmakers nor the guarantees of civil liberties into their exact historic forms in the 18th and 19th centuries, as long as the extension remains true to the initial principle." *Id.* at 434.

An example close in point may be found in *Vannatta*, in which the Supreme Court stated that state laws that impose penalties for political candidates "who mislead the public or engage in fraud" do not violate Article I, section 8, because they would come within a historical exception for conduct constituting fraud. 324 Or at 544. It is interesting to note that the court offered the observation without engaging in an element-by-element comparison of current and historical legislation. Moreover the court concluded that the modern statutes setting out the offenses of misleading the public and election fraud would *both* be subject to the same historical exception. That is especially noteworthy in that the statute describing the offense of misleading the public, ORS 260.532, does not appear to contain all the elements of common-law fraud.[3]

In a similar vein, in *State v. Huntley*, 82 Or App 350, 356, 728 P2d 868 (1986), *rev den*, 302 Or 594 (1987), this court concluded that ORS 260.715(1), a statute prohibiting false statements, oaths, or affidavits

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[3] Among other things, ORS 260.532(3) makes the candidate responsible for misleading campaign representations if the candidate knows of and consents to the publication of such material, followed by ORS 260.532(4), which creates a *rebuttable presumption* that the candidate has such knowledge.

in elections, was subject to the historical exception for conduct constituting perjury. We did so even though the nineteenth-century exception itself was limited to falsely sworn oaths or affirmations and did not include unsworn false statements. *Id.*

With that in mind, we turn to the question whether a historical exception applies to ORS 260.402. In light of what we have just recounted regarding the *Vannatta* and *Huntley* decisions, it seems to follow that one or both of the historical exceptions that were mentioned in those cases apply to ORS 260.402.

First, as noted, in *Vannatta*, the Supreme Court stated that laws prohibiting candidates from making statements that mislead the public fall within the historical exception for fraud. 324 Or at 544. We can identify no reason why a law that prohibits a contributor from providing misleading information to the candidate—information that that candidate is then required to pass onto the voters—is not subject to the same exception. In either case, the prohibited act results in the public being misled during the election process.

The dissent rejects fraud as a potential historical exception because ORS 260.402 does not require that the misleading information be material, which is an element of common-law fraud. As we have mentioned above, however, the cases do not require an exact match to each and every element of a historical exception. Aside from that, the dissent never explains how the element of materiality could be satisfied in a way that the statute does not already state. The fact is that the people and the legislature have determined that providing false information is harmful to the election process.

Second, again as noted, in *Huntley*, we upheld the statute that prohibits making a "false statement, oath or affidavit" when the election laws require any statement, oath, or affidavit, ORS 260.715(1). In that particular case, the defendant was accused of supplying false information for the voters' pamphlet. 82 Or App at 352. We concluded that the statute was subject to the historical exception for conduct constituting perjury. *Id.* at 356. We did so even though the nineteenth-century perjury statutes did not apply to unsworn statements. We concluded that the form the defendant had signed—stating that the information that he had supplied was true to the best of his knowledge—was sufficient to indicate that the defendant was aware of the seriousness of the document that he was signing. *Id.* We said that, although that was not a sworn statement, it was enough to address the gravamen of the underlying historical offense. *Id.* We expressly saved for another day the question whether even the certification that the defendant provided was required to establish the applicability of the historical exception of perjury. *Id.* at 356 n 7.

The dissent rejects perjury as an applicable historical exception in this case because there its "nothing equivalent in ORS 260.402 to the oath or affirmation that is a fundamental part of the crime of perjury." 225 Or App at 113 (Sercombe, J., dissenting). The dissent, however, overlooks the fact that there was nothing in the language of the statute that we upheld in *Huntley* that was the equivalent to an oath or affirmation either. The dissent also suggests that the statute that we upheld in *Huntley* applied only to false statements to the public, not to private persons or political committees. "Lying to a public official," the dissent reasons, "has more presumed bad effects than lying to a private person." 225 Or App at 113 n 4

(Sercombe, J., dissenting). What the dissent fails to grasp, though, is that the false information that is given to a candidate or political committee in violation of ORS 260.402 is required by law to be passed on to the filing officer and, ultimately, to the public.

In short, ORS 260.402 passes muster as a *Robertson* second-category statute that is not unconstitutionally overbroad. In the alternative, if it is a *Robertson* first-category statute, it nevertheless is wholly contained within a well-established historical exception. In either case, the trial court erred in ruling that ORS 260.402 violates Article I, section 8, of the Oregon Constitution.

C. *First Amendment*

The First Amendment to the United States Constitution provides, in part, that "Congress shall make no law * * * abridging the freedom of speech, or of the press." The amendment has been held to apply to the states through the Due Process Clause of the Fourteenth Amendment. *New York Times Co. v. Sullivan*, 376 US 254, 264 n 4, 84 S Ct 710, 11 L Ed 2d 686 (1964).

In *Buckley*, 424 US 1, the United States Supreme Court concluded that a statutory requirement that campaign contributors disclose their identities does not violate the First Amendment. The court explained that "[t]he burden imposed by [disclosure] is no prior restraint, but a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Id.* at 82.

If a law that requires disclosure of a contributor's identity does not offend First Amendment guarantees,

we do not understand how a law that merely requires that such disclosures be truthful does. We conclude that the trial court also erred in ruling that ORS 260.402 violates the First Amendment.

D. *Defendants' cross-assignment: Vagueness*

Finally, defendants contend that, if the trial court erred in concluding that ORS 260.402 violates the free speech guarantees of the state and federal constitutions, we nevertheless should affirm the judgment allowing defendants' demurrer because the court erred in rejecting their argument that the statute is unconstitutionally vague. According to defendants, the statute offers "no discernible standard of conduct at all" in that it prohibits contributions "relating to" a nomination or election of a candidate in a name other than that of the person who "in truth provides" the contribution. Neither term, defendants complain, is capable of meaningful definition and application. The state insists that the statute is sufficiently precise and that the trial court did not err in rejecting defendants' vagueness challenge.

We agree with the state that the trial court did not err in that regard. As we explained in *State v. Krueger*, 208 Or App 166, 170-71, 144 P3d 1007 (2006) (quoting *Illig-Renn*, 341 Or at 239-40),

> "to say that a law is unconstitutionally 'vague' can refer to any of three different problems. First, a statute may be so vaguely crafted as to permit arbitrary or unequal application and uncontrolled discretion, in violation of Article I, sections 20 and 21, of the Oregon Constitution. Second, a statute may create an 'unlawful delegation issue' under the Due Process Clause of the Fourteenth Amendment in that it contains no

> identifiable standards or employs standards that rely on the 'shifting and subjective judgments of the persons who are charged with enforcing it.' Third, a statute may be so poorly written as to fail to provide 'fair warning' of the conduct that it prohibits, in violation of the Due Process Clause."

(Citations omitted.) Defendants contend that ORS 260.402 is flawed in each of those respects, although they do not explain precisely why that is so, beyond complaining that the two phrases that we have quoted are "lacking in specificity."

"[A]bsolute precision," however, "is not required to overcome a facial vagueness challenge." *Illig-Renn*, 341 Or at 243. As the Supreme Court explained in *State v. Graves*, 299 Or 189, 195, 700 P2d 244 (1985), "[a] criminal statute need not define an offense with such precision that a person in. every case can determine in advance that a specific conduct will be within the statute's reach." What is required is "a reasonable degree of certainty." *Id.*

In our view, neither of the two phrases about which defendants complain is unconstitutionally vague in any of the three senses that are prohibited. To begin with, our task is not to examine the challenged words or phrases in a vacuum. While it may be the case that, for example, a definition of "truth" as an abstract proposition can be difficult to articulate, it does not necessarily follow that, when viewed in the context of the statute at issue, its meaning is not fairly straightforward. Moreover, when examined as a whole, the statute does not call for the sort of subjective assessments that can lead to arbitrary or discriminatory application. Nor does it deprive anyone of fair notice of the conduct that is prohibited.

We reject defendants' vagueness challenge without further discussion. The trial court did not err in rejecting defendants' constitutional challenge to ORS 260.402 on that ground. As we have explained, however, the trial court did err in concluding that the statute violates state and federal constitutional guarantees of freedom of expression.

Reversed and remanded.

Haselton and Ortega, JJ., join in this opinion.

BREWER, C.J., concurring:

I agree with the majority that ORS 260.402 focuses on the harmful effects of speech, not speech itself. Therefore, I concur in the result that the majority reaches.

I disagree, however, that the statute is wholly contained within a historical exception to the guarantee of Article I, section 8, of the Oregon Constitution. My quarrel is not with the majority's able effort to apply the historical exception prong of the *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), methodology. Suffice it to say that, in my view, a more practical and predictable basis for determining the scope of the constitutional guarantee lies in the distinction between speech and its effects, rather than in reliance on the sometimes debatable and obscure remnants that a limited historical record may yield concerning possible exceptions that do not comport with the constitutional text.

Accordingly, I respectfully concur.

Edmonds, J., joins in this concurrence.

SCHUMAN, J., concurring.

Accepting, as I must, that a campaign contribution is a form of expression that is protected by Article I,

section 8, of the Oregon Constitution, *Vannatta v. Keisling*, 324 Or 514, 524, 931 P2d 770 (1997), I agree with the dissent that ORS 260.402 (2003) is a law that prohibits expression *per se* and not a law that focuses on harm that is caused by expression. The statute prohibits a specified type of expression: falsely attributed campaign contributions. Although the statute itself specifies no harm that it is intended to prevent, the purpose of the statute is presumably to prevent members of the public from being deceived about the source of the contribution. Thus, as the lead opinion contends, "the harm *necessarily* occurs whenever an individual makes election campaign contributions without reporting accurately who is making the contribution." 225 Or App at 93 (emphasis in original). Further, it is a kind of harm—being deceived—that can be achieved *only* through expression, that is, through one person's communication of some sort of falsehood to another person.

As the Supreme Court made clear in *State v. Robertson*, 293 Or 402, 412, 649 P2d 569 (1982), statutes that impose criminal sanctions for deception that can be accomplished only through speech are presumptively unconstitutional, unless, like statutes punishing perjury, fraud, and forgery, they fall within some well-established historical exception to free speech guarantees. I therefore agree with the dissent that ORS 260.402 (2003) is what has come to be a "*Robertson* category I" statute.

I concur with the lead opinion, however, because I agree that the statute is a "contemporary variant[ ]," *Robertson*, 293 Or at 412, of a historical exception to free speech guarantees.

SERCOMBE, J., dissenting:

I do not differ with the lead opinion in identifying the principles to be applied to determine the constitutionality of ORS 260.402 (2003)[1] under Article I, section 8, of the Oregon Constitution. Those principles were identified in *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), and *Vannatta v. Keisling*, 324 Or 514, 931 P2d 770 (1997). Where I differ with the lead opinion is in the classification of the law under the principles enunciated in those cases.

The lead opinion infers a material and harmful effect from every violation of the statute - an infringement of the people's "right to know" the source of all political contributions. That inference is the foundation of the lead opinion's classification of ORS 260.402 under *Robertson* as a law regulating only the effects of speech. It is also the crux of the lead opinion's reasoning that ORS 260.402 is the progeny of the common-law crimes of perjury and fraud, crimes that require proof of material harm in order to obtain conviction.

I disagree with the lead opinion's reasoning in three respects. First, I do not believe that ORS 260.402 is a law that regulates only on the basis of the effects of speech. The undesired effects are not stated in the law itself or in the statutory context of the law. Because ORS 260.402 regulates the speech act itself, the "mak[ing of] a contribution," rather than the effects of that speech, the statute is unconstitutional under *Robertson* unless the law fits within a well-established historical exception to the application of Article I, section 8. Second, even assuming that a

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[1] Unless otherwise noted, references to ORS 260.402 in this opinion are to the 2003 version of that statute.

more lenient constitutional test exists under *Robertson* to sustain a regulation of speech when the communication necessarily produces harm, ORS 260.402 does not qualify under that test. ORS 260.402 can be violated by conduct that does not produce any harmful effect. Finally, ORS 260.402 has nothing in common with any traditional crime that punishes untrue speech other than a common subject of false utterances. It does not fit within any well-established historical exception to the application of Article I, section 8.

I conclude that the statute restricts a communicative act (the making of a political. contribution), without regard to any necessary effect of that act (as affecting voter behavior, the election process, or the content of public disclosures), and in an unprecedented fashion (because any historic regulation of untrue speech requires that the untruth be material and the deceit to be intentional). In light of these conclusions, I believe that ORS 260.402 is unconstitutional under Article I, section 8. I respectfully dissent from the lead opinion's conclusions to the contrary.

I. CLASSIFICATION OF ORS 260.402 UNDER *ROBERTSON*

The constitutionality of ORS 260.402 under Article I, section 8, is tested by the framework adopted by the Supreme Court in *Robertson*. In that case, the court recognized a distinction between laws that criminalize speech based on its content and laws that regulate undesired effects of speech. Under *Robertson*, the first category of legislation regulated by Article 1, section 8, consists of laws that restrain or restrict the content of speech in ways that were not historically established and intended to be allowed to continue

after adoption of the Oregon Constitution. The *Robertson* court held:

> "Article I, section 8, for instance, forbids lawmakers to pass any law 'restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever,' beyond providing a remedy for any person injured by the 'abuse' of this right. This forecloses the enactment of any law written in terms directed to the substance of any 'opinion' or any 'subject' of communication, unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach. Examples are perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants. *See* Greenawalt, *Speech and Crime*, 1980 Am B Found Res J 645, 648-70. Only if a law passes that test is it open to a narrowing construction to avoid 'overbreadth' or to scrutiny of its application to particular facts."

293 Or at 412 (footnote omitted).

If a law is aimed not at the content of speech but at specific harms or proscribed effects that could be caused by speech, its constitutionality is tested by the breadth of the law or particulars of its application. *Robertson* describes a second category of laws as those that expressly prohibit expression used to achieve forbidden effects:

> "When the proscribed means include speech or writing, however, even a law written to focus on a forbidden effect * * * must be scrutinized to

> determine whether it appears to reach privileged communication or whether it can be interpreted to avoid such 'overbreadth.'"

Id. at 417-18.

Thus, the meaning and effect of ORS 260.402 must be examined in order to categorize the statute under *Robertson*. *See State v. Ausmus*, 336 Or 493, 499, 85 P3d 864 (2003); *Leppanen v. Lane Transit District*, 181 Or App 136, 143, 45 P3d 501 (2002) (construing statutes before reaching facial constitutionality issues). The meaning of a statute, *i.e.*, the legislative intent in its enactment, is discerned from the statute's text and context, and then from the record of its adoption if the meaning remains unclear. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). The text and context of ORS 260.402 suggest a plain meaning of the statute.

ORS 260.402 provided, in part:

> "No person shall make a contribution to any other person, relating to a nomination or election of any candidate or the support or opposition to any measure, in any name other than that of the person who in truth provides the contribution."

As defined by ORS 260.005(3)(a), "contribution" includes:

> "(A) The payment, loan, gift, forgiving of indebtedness, or furnishing without equivalent compensation or consideration, of money, services other than personal services for which no compensation is asked or given, supplies, equipment or any other thing of value:
>
> "(i) For the purpose of influencing an election for public office or an election on a measure, or

of reducing the debt of a candidate for nomination or election to public office or the debt of a political committee; or

"(ii) To or on behalf of a candidate, political committee or measure; and

"(B) Any unfulfilled pledge, subscription, agreement or promise, whether or not legally enforceable, to make a contribution."

Thus, a violation of ORS 260.402 occurs by an actual or promised transfer of money, certain services, or things of value directly or indirectly to a political campaign "in any name other than that of the person who in truth provides the contribution." A false name contribution could occur by a contributor using either someone else's name or money in the making of a contribution. In either event, the act that is regulated is the "mak[ing of] a contribution * * * relating to a nomination or election of any candidate or the support or opposition to any measure." Some acts of "mak[ing] a contribution" are unlawful under ORS 260.402; others are not.

It is settled that the contribution of money to a political candidate or committee—the act at issue in this case—is part of the "free expression of opinion" or the "right to speak [or] write * * * freely on any subject whatever" that is protected by Article I, section 8. In *Vannatta*, 324 Or at 524, the Supreme Court held that "both campaign contributions and expenditures are forms of expression for the purposes of Article I, section 8." At issue in *Vannatta* was the legality of campaign finance restrictions in an initiated statute (Measure 9), that directly limited the amount of money that could be contributed to a political campaign. The court reasoned:

> "However, the contribution, in and of itself, is *the contributor's expression of support for the candidate or cause*—an act of expression that is completed by the act of giving and that depends in no way on the ultimate use to which the contribution is put."

Id. at 522 (emphasis in original).

The court determined that the restriction on the amount of political contributions was "written in terms directed to the substance of any 'opinion' or any 'subject' of communication" under *Robertson* 324 Or at 536. Similarly, the court concluded that other limitations on the making of campaign contributions were category one laws under *Robertson*. For example, section 4 of the measure provided that a candidate or campaign committee "shall not make a contribution" to other candidates or committees. Section 16 inhibited corporations and labor organizations from "mak[ing] a contribution" to a candidate or political committee. The court determined that "the contribution provisions in Measure 9 are targeted at the content of speech, *i.e.*, political support for a candidate, and thereby fall under the first level of Article I, section 8, scrutiny." *Vannatta*, 324 Or at 537. The court observed:

> "All the listed provisions of Measure 9 either expressly limit, or ban outright, campaign contributions that may be given to or that may be accepted by a candidate. By their terms, those provisions are targeted at protected speech."

Id. at 537-38.

For the same reasons, I would hold that ORS 260.402 is a direct prohibition on a type of speech and that its legality is tested by the *Robertson* standards for category one laws. The conduct that is made

unlawful by ORS 260.402 is based on what the speaker says ("mak[ing] a contribution") and not on any particular effect of that speech. "Contribution" is defined, in part, as furnishing money or services "[f]or the purpose of influencing an election." ORS 260.005(3)(a)(A)(i). The statute restricts "mak[ing] a contribution" in a false name by attaching criminal penalties to that conduct. ORS 260.993(2) (violation of ORS 260.402 as Class C felony). That effect inhibits a person from expressing political support for a candidate or measure by contributing money to that candidate or measure using someone else's money. Even if the implied source of the money is false, the contribution is nonetheless an expression of political support by the person making the contribution. ORS 260.402 directly restricts that expression of political support.

The lead opinion categorizes ORS 260.402 differently. It cites two observations by the *Vannatta* court as material to the analysis in this case. Because *Vannatta* notes that "*many* political contributions constitute expression," the lead opinion reasons that "[i]t is important to emphasize that the court did not say that *all* contributions constitute expression." 225 Or App at 89 (emphasis in original). ORS 260.402, however, is not restricted by its terms to applying only to contributions that do not express political support. Indeed, the contribution at issue in this case—the payment of a money to a political candidate—is an expression of political support.

The lead opinion then observes that *Vannatta* distinguishes between laws limiting financial contributions and expenditures and laws that "impose requirements distinct from contribution or expenditure limitations (*e.g.*, requirements of disclosure of financing

sources and the extent of any gift)" that "may not necessarily offend" Article I, section 8. *Vannatta*, 324 Or at 523. The lead opinion concludes that ORS 260.402 "does not limit contributions directly" but is a mere "reporting requirement," a disclosure law that does not restrict expressive conduct. 225 Or App at 90-91. It labels ORS 260.402 as a second category *Robertson* law in light of that classification.

ORS 260.402 is not a disclosure law in that sense. The statute does not provide that, if you make a contribution using someone else's money, you must disclose the name of the owner of the money. It provides that you cannot make a contribution using someone else's money—period. The statute restricts the act of contribution. If a person writes a check to a political committee, using funds given to that person for that purpose by someone else, ORS 260.402 is violated when the check is conveyed. The contribution is "in [the] name other than that of the person who in truth provides the contribution" Even if that person later discloses the identity of the source of the money, the contribution itself is false and a violation of ORS 260.402. The statute does not require the maker of the check to separately verify the source of the funds or to attest to anything. The constitutionality of such a disclosure law is not before the court

Instead, ORS 260.402 prohibits "mak[ing]s a contribution" using another person's money or name. In prohibiting the making of those two types of political contributions, ORS 260.402 targets the content of speech, an insincere expression of political support for a candidate or measure. Therefore, the statute is properly classified as a *Robertson* category one law.

II. CLASSIFICATION OF ORS 260.402 BY ITS NECESSARY EFFECTS

In *State v. Stoneman*, 323 Or 536, 920 P2d 535 (1996), the Supreme Court recognized that a restraint on speech could be a second category law under *Robertson* if the "actual focus of the enactment" is on a proscribed harm or effect *Id.* at 543. The statute at issue in *Stoneman*, ORS 163.680 (1987), made it unlawful to pay or give anything of value to observe or view reproductions of sexually explicit conduct by a child known by the person to be under 18 years of age. The court held that the statute prohibited the purchase of communicative materials "not in terms of their communicative *substance,* but in terms of their status as the products of acts that necessarily have harmed the child participants," harm that was defined under child abuse criminal statutes that were contextually related to ORS 163.680. *Id.* at 548. Because that harm was identified in contextually related laws, and because the harm "necessarily" resulted from every violation of ORS 163.680, the court found the statute to be a second category law, one written to focus on a forbidden effect. As noted by the lead opinion, *City of Portland v. Tidyman*, 306 Or 174, 185-86, 759 P2d 242 (1988), requires that in order to qualify as a second category law, the "operative text" of the statute must "specify the adverse effects." The tension between *Stoneman and Tidyman* suggests that, at the very least, the *Stoneman* analysis should be confined to regulated communications that necessarily offend a related law.

The lead opinion concludes that *Stoneman* supports categorization of ORS 260.402 as a second category law. It reasons that loss of a person's "right to know" the source of campaign contributions necessarily

results from making contributions in a false name and that this necessary effect should be inferred from the operation of the statute in the context of other campaign financing laws. I do not believe that unsatisfied curiosity is sufficiently identified as a harm in any statute related to ORS 260.402. As noted in *Vannatta*, "it is not sufficient to select a phenomenon and label it as a 'harm.'" 324 Or at 539. Rather, "the 'harm' that legislation aims to avoid must be identifiable front legislation itself, not from social debate and competing studies * * *." *Id.* The text of contribution and expenditure reporting laws identified by the lead opinion does not expressly create any enforceable rights or identify any particular harm. Instead, the lead opinion creates a "right to know" from the purposes of the 1908 Corrupt Practices Act that were identified in *Nickerson v. Mecklem*, 169 Or 270, 277, 126 P2d 1095 (1942) ("People have the right to know—and it is so contemplated by the act—who is spending money and the amount thereof * * *.") I believe that any harmful effects engrafted to a law under a *Stoneman* analysis must be clearly and expressly identified in a related law. The lead opinion does not identify any such related law to ORS 260.402.

Moreover, any "right to know" created by the contribution and expenditure reporting laws is necessarily limited to the disclosures required by those laws. At the time of the alleged offenses in this case, ORS 260.083(1)(a)(A) required public reporting by candidates and committees of elections of the identity of donors of aggregated contributions in excess of $50. Other contributions are aggregated and reported as a single item in the contribution and expenditure

report.[2] Thus, there was no "right to know" the identity of contributors of smaller amounts. ORS 260.402 nonetheless punished false contributions of those lesser amounts. Because every violation of ORS 260.402 does not necessarily result in a loss of "right to know," the statute does not regulate on the basis of that forbidden effect. Put another way, a violation of the statute can occur even when any inferred harm does not. That fact alone defeats any argument that the statute regulates effects.

III. HISTORICAL EXCEPTIONS ANALYSIS

I do not agree that ORS 260.402 fits wholly within any historical exception "that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended reach." *Robertson*, 293 Or at 412; *see State v. Moyle*, 299 Or 691, 695, 705 P2d 740 (1985) (describing the historical exception as a crime that was "well established at the time our constitutional guarantee was enacted and demonstrably outside the aims of the guarantee of freedom of expression"). The examples given in *Robertson* were "perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and

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[2] Under ORS 260.057, political committees and candidates must file with the Secretary of State statements of contributions received and expenditures made by the candidate and political committee. ORS 260.083(1)(a) required those statements to include the "name, occupation and address of each person * * * that contributed an aggregate amount of more than $50 on behalf of a candidate or to a political committee and the total amount contributed by that person or political committee" as well as the "total amount of other contributions as a single item, but shall specify how those contributions were obtained." The $50 benchmark was raised to $100 in 2007. Or Laws 2005, ch 809.

fraud and their contemporary variants." *Robertson*, 293 Or at 412. The crimes listed in *Robertson* are all crimes where false or misleading speech is a core element of the crime—as laws "restricting the right to speak, write, or print freely on any subject whatever." Those laws would be invalid under Article I, section 8, but for the fact that those crimes were within a historical exception. Thus, the state is incorrect in arguing that, because ORS 260.402 affects only false speech, it falls outside the limitations of Article I, section 8.

A speech regulation may be a permissible "contemporary variant," in the words of *Robertson*, of a historical exception to the constitutional limitations on laws directed to the substance of communication. I agree with the lead opinion's contention that *Robertson*'s historical exception analysis does not require that "the statute under examination match precisely, element by element, a historical exception." 225 Or App at 94. However, the spirit and intent of the statute that is considered the "variant" must at the very least embody that of the earlier version. For the reasons that follow, I believe that ORS 260.402 does not fit nicely into any historical exception.

As a matter of specific predicate, there was no well-established regulation of political campaign contributions at the time of the enactments of the federal and state constitutions. In *Vannatta*, the Supreme Court found that, "[a]t the time of statehood and the adoption of Article I, section 8, there was no established tradition of enacting laws to limit campaign contributions." 324 Or at 538. As noted above, Oregon voters initiated and then adopted the state's first campaign finance law, the Corrupt Practices Act, at the June 1908 election. Or Laws 1909, ch 3. At the

time of the adoption of the Oregon Constitution in 1859, then, the regulation of campaign contributions and political campaigns was a half century away.

Similarly, federal regulation of campaign financing dates from 1907 with the passage of the Tilman Act. Act of Jan 26, 1907, ch 420, 34 Stat 864. The Tilman Act banned corporate contributions to campaigns for federal offices. Federal prohibitions on contributions in the name of another occurred in the 1971 Federal Election Campaign Act, 2 USC section 441f. *See* Robert D. Probasco, *Prosecuting Conduit Campaign Contributions—Hard Time for Soft Money*, 42 S Tex L Rev 841, 846. (2001). Thus, neither the regulation of political campaign contributions in general, nor the preclusion of untruthful campaign contributions in particular, were established prior to the adoption of the free speech guarantees.

Therefore, to survive Article I, section 8, ORS 260.402 must fit within, or be a contemporary variant of, a traditional speech crime. At common law, the mere making of an untrue statement was not punished. Although lying was considered morally circumspect, Blackstone distinguished it from criminal liability:

> "The vice of lying, which consists (abstractedly taken) in a criminal violation of truth and therefore in any shape derogatory from sound morality, is not however taken notice of by our law, unless it causes with it some public inconvenience * * *."

William Blackstone, *Commentaries* at 16 (Vol 4, ch 4). That "public inconvenience" was the production of a material and harmful effect by the lie. The creation of that effect is part of the crimes of fraud and perjury

that the lead opinion pegs as the antecedents of ORS 260.402. The prohibition on making a campaign contribution in a false name does not require that effect.

The traditional elements of common-law fraud required: (1) a false representation of material fact; (2) known to be false; (3) made with the intent to induce the recipient to act or refrain from acting; (4) where the recipient justifiably relied on the representation; and (5) the recipient was damaged by that reliance. *Pollock v. D. R. Horton, Inc.-Portland*, 190 Or App 1, 20, 77 P3d.1120 (2003). "[F]raud is one of the conventional speech crimes that can be regulated even if the law focuses on the speech itself." *State v. Porter*, 198 Or App 274, 278, 108 P3d 107 (2005) (citing *Robertson*, 293 Or at 412). In *Porter*, the court considered the constitutionality of an identity theft statute, ORS 165.800, criminalizing deception or fraud. The court analyzed ORS 165.800 "only to the extent that it purport[ed] to criminalize creating or uttering the identification of another with the intent to deceive." *Id.* The inquiry was whether the law focused on speech *per se*. In concluding that the identity theft statute did not focus on speech *per se*, but rather on an attempt to cause a forbidden harm (deceit), we reasoned:

> "At first blush, the identity theft statute appears to be of that type because it 'makes the speaking of the words themselves criminal, if spoken with the requisite intent, even if no harm [is] caused or threatened.' *Spencer*, 289 Or at 229. Closer scrutiny, however, yields a different conclusion. The harm that the statute targets is deception. A person who either creates or utters the identification of another and who *intends* that act to deceive has taken a substantial step toward

> accomplishing the deception; the person, in other words, has *attempted* to achieve harm."

Id. at 279 (emphasis in original).

A violation of ORS 260.402 requires neither intentional conduct nor actual deception. As noted above, a false contribution above $50, for example, could result in a false reporting of that contribution in a contribution and expenditure report under ORS 260.083(1)(a)(A), a report that is filed as a public record. Requiring that kind of ill effect as consequence of a false contribution might better align ORS 260.420(1) with traditional fraud. But ORS 260.402 requires no intended or obtained effect or materiality of the false speech and therefore it does not fit within the fraud exception.

The lead opinion suggests that ORS 260.402 qualifies as a contemporary variant of the perjury exception. Perjury a sworn falsification, was a crime at common law, defined as a person willfully and corruptly giving false testimony on a material point in a judicial proceeding under oath. *See* Charles E. Torchia, 4 *Wharton's Criminal Law* § 574 (15th ed. 1993). *See* General Laws of Oregon, Crim Code, ch XLVI, § 598, p 549 (Deady 1845-1864) (crime of perjury and subordination of perjury).[3] An analogous crime at common law was that of "false swearing," similar to

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[3] Blackstone notes:

> "The perjury must also be willful, positive, and absolute; not upon surprise, or the like: it also must be in some point material to the question in dispute; for if it only be in some trifling circumstances, to which no regard is paid, it is no more penal than in the voluntary extra-judicial oaths before-mentioned."

William Blackstone, *Commentaries* at 16 (Vol 4, ch 10).

perjury in that it required an oath and had to be material. However, false swearing differed from perjury "in that the false oath in perjury may relate only to testimony given in a judicial proceeding, whereas the false oath in false swearing may relate not only to testimony but also to a statement, and it may be given not merely in a judicial proceeding but in any proceeding or matter in which an oath is required or authorized by law." Torchia, 4 *Wharton's Criminal Law* § 579 (footnote omitted). Both false swearing and perjury required materiality, meaning that the statement had to be capable of affecting the "course or outcome" of the proceeding. *Id* at § 591. Both crimes required the falsehood to be made in a governmental proceeding or to a public official, where an oath is required by law.

In *State v. Huntley*, 82 Or App 350, 728 P2d 868 (1986), *rev den*, 302 Or 594 (1987), we upheld ORS 260.715(1), a statute that punished the certification of false statements in the voters' pamphlet, as constitutional under Article I, section 8. We found the law to be a contemporary variant of perjury, and the certification to be analogous to the purpose "served by oaths and affidavits: to impress upon the speaker the gravity of the occasion and the necessity for truth-telling." *Id.* at 356. Thus, we held that,

> "[w]hen a statement, required by the election laws, is certified as true by the signator, criminal prosecution and conviction for furnishing false information is a contemporary variant of perjury and is not beyond constitutional limits.[7]

> "[7] We are not asked to decide whether an uncertified statement could be the subject of a constitutional limitation, and we offer no opinion on that issue."

Id. The lead opinion would expand the logic of *Huntley* and the perjury exception to campaign contributions made under a false name. 225 Or App at 94. The statute upheld in *Huntley* prohibited criminalized statements that "[a]lthough it not a sworn statement, it is one certified as true." *Huntley*, 82 Or App at 356. The statute in this case, ORS 260.402, does not contain any requirement that there be an oath, affirmation, certification, or verification of truthfulness in any respect, making it neither analogous nor a contemporary variant to perjury.

Thus, there is a significant difference between ORS 260.402 and ORS 260.715(1), a law pertaining to false certifications in an election, that undercuts the perjury analogy for ORS 260.402. ORS 260.402 does not require the identity of the contributor to be certified, *i.e.*, to be attested as true by the person making the contribution. There is nothing equivalent in ORS 260.402 to the oath or affirmation that is a fundamental part of the crime of perjury or the certification in *Huntley* that is the contemporary variant of an oath or affidavit. We recognized in *Huntley* that limitations on an uncertified statement posed a different question. I disagree with the lead opinion and would conclude that ORS 260.402 is not the progeny of the historic crimes of perjury or false swearing.[4]

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[4] ORS 260.402 may be distinguishable from perjury for a second reason. The statute regulates false statements to private persons or political committees, unlike ORS 260.715(1) that relates to false statements to election officials and the crimes of perjury or false swearing to public officials. The proscribed false name contribution is a communication to a candidate or to backers of a measure. It is not a communication to an election official or to the voters: As noted earlier, only some political contribu-

ORS 260.402 is not an outgrowth, then, of traditional crimes involving untrue speech. The conduct that is the subject of ORS 260.402 lacks the required undesired effects of fraud and perjury, requirements that are core to the definitions of those crimes. Instead, ORS 260.402 directly proscribes false speech without regard to the materiality of the speech, the intended effect of the speech, or any official context of the speech. I am not prepared to say, as the lead opinion suggests, that the punishment of any false speech is constitutionally appropriate under Article I, section 8, because *some* types of untrue speech were proscribed historically. Instead, the common-law crimes involving untrue speech all require another quality to distinguish the lie from ordinary dissemblance—that the lie produce undesired consequences to private persons or entities or in governmental records or processes.[5] ORS 260.402, by its terms as well as its

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tions are reported to the public in campaign finance reports. Lying to a public official, as is the case for perjury and false swearing, has more presumed bad effects than lying to a private person and the historic regulation of both types of falsehoods differ. The lead opinion contends that ORS 260.402(1) is the functional equivalent of a communication to an election official or the voters because the identity of the contributor "is required by law to be passed on to the filing officer and, ultimately, to the public." 225 Or App at 96. As noted earlier, aggregated contributions under $50 are not reported to the Secretary of State under ORS 160.083(1)(a)(A) and some contributions are not reported to the voters because they are not disclosed until after the election. Thus, not all communications proscribed by ORS 260.402 are conveyed to the state or the public.

[5] The statutes cited by the lead opinion, and noted in *Vannatta*, as contemporary variants of fraud qualify the untrue speech in this same way. 324 Or at 544. ORS 260.532(1) criminalizes some false publications relating to a candidate or measure, requiring that the publication be done "with knowledge or with reckless disregard that [the publication] contains a false state-

necessary operation, regulates some speech without this quality. ORS 260.402 is unconstitutional under Article I, section 8, because it is a law directed to the substance of the communicative aspect of political contributions that has no well-established antecedent existing before the adoption of the Oregon Constitution. I dissent from the contrary conclusion reached by the lead opinion.

Armstrong Wollheim, and Rosenblum, JJ., join in this dissent.

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ment *of material fact* relating to any candidate, political committee or measure." (Emphasis added.) ORS 260.355 permits a court to deprive a person of a nomination or election to public office for a "deliberate and material" violation of an election law.

APPENDIX D

IN THE SUPREME COURT OF THE
STATE OF OREGON

(CC 0409-35104; CA A128796 (Control))

STATE OF OREGON,
Respondent on Review,

v.

THOMAS PAUL MOYER,
Petitioner on Review.

(CC 0409-35105; CA A128797)

STATE OF OREGON,
Respondent on Review,

v.

VANESSA COLLEEN STURGEON,
aka Vanessa Sturgeon,
aka Vanessa Colleen Kassab,
Petitioner on Review.

(CC 0409-35106; CA A128798)
(SC S056990)

STATE OF OREGON,
Respondent on Review,

v.

SONJA R. TUNE,
Petitioner on Review.

En Banc

On review from the Court of Appeals.*

Argued and submitted September 18, 2009.

Ronald H. Hoevet, Hoevet, Boise & Olson P.C., Portland, argued the cause for petitioner on review Vanessa Colleen Sturgeon. With him on the joint briefs were Michael T. Garone and David Axelrod, Schwabe, Williamson & Wyatt, P.C., Portland; and Janet Lee Hoffman and Shannon Riordan, Hoffman Angeli, LLP, Portland.

Erika L. Hadlock, Deputy Solicitor General, Salem, argued the cause for respondent on review. With her on the brief were John R. Kroger, Attorney General, and Jerome Lidz, Solicitor General.

Linda K. Williams and Daniel W. Meek, Portland, filed a brief on behalf of *amici curiae* Policy Initiatives Group, Joan Horton, Ken Lewis, Bryn Hazel, Francis Nelson, Tom Civiletti, David Delk, and Gary Duell.

Thomas M. Christ, Portland, filed a brief on behalf of *amicus curiae* ACLU Foundation of Oregon, Inc.

DE MUNIZ, C. J.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

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* Appeal from Multnomah County Circuit Court, John A. Wittmayer, Judge. 225 Or App 81, 200 P3d 619 (2009).

DE MUNIZ, C. J.

Defendants are charged with violating ORS 260.402 (2003),[1] which provided, in part, that "[n]o person shall make a contribution to any other person, relating to a nomination or election of any candidate or the support or opposition to any measure, in any name other than that of the person who in truth provides the contribution." Defendants demurred to the indictment on the ground that the statute, on its face, violates the free expression clauses of Article I, section 8, of the Oregon Constitution and the First Amendment to the United States Constitution. The trial court agreed with defendants and sustained the demurrer. The state appealed, and the Court of Appeals reversed. *State v. Moyer*, 225 Or App 81, 200 P3d 619 (2009). We allowed defendants' petition for review and, for the reasons that follow, affirm the decision of the Court of Appeals.

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[1] ORS 260.402 (2003) provided:

> "No person shall make a contribution to any other person, relating to a nomination or election of any candidate or the support or opposition to any measure, in any name other than that of the person who in truth provides the contribution. No person shall knowingly receive the contribution or enter or cause it to be entered in accounts or records in another name than that of the person by whom it was actually provided. However, if the contribution is received from the treasurer of any political committee, it shall be sufficient to enter it as received from the treasurer."

The statute has been amended since defendants were charged in this case. However, the wording changes in the current statute are not material to the issues in this case. Unless otherwise noted, all references to ORS chapter 260 in this opinion are to the 2003 version, which is the version that applies to this case.

Because the trial court sustained defendants' demurrer, the only relevant facts on review are those alleged in the indictment. *State v. Illig-Renn*, 341 Or 228, 230 n 2, 142 P3d 62 (2006). The first count of the indictment states:

> "The said defendants **THOMAS PAUL MOYER and VANESSA COLLEEN KASSAB**, on or about May 16, 2003, in the County of Multnomah County, State of Oregon, did unlawfully and knowing[ly] make a contribution to a candidate, in relation to his campaign for election to public office, in a name other than * * * that of the person who in truth provided the contribution, to-wit: by making a contribution of $2,500 in the name of **'VANESSA KASSAB'** to Jim Francesconi in support of his campaign for the Mayor of Portland, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon[.]"

(Boldface and uppercase in original.) The second count asserted the same charge against defendants Moyer and Tune, based on a $2,000 contribution in the name of "Sonja Tune." Defendants demurred to the indictment, contending that ORS 260.402 unlawfully restrains expression and political association and also is impermissibly vague and overbroad. Although the trial court rejected the claim that the statute is unconstitutionally vague, it sustained defendants' demurrer, agreeing with defendants that the statute impermissibly restrains expression in violation of state and federal constitutional free speech guarantees.

The state appealed, and defendants cross-assigned error, asserting that the trial court erred when it concluded that the statute was not unconstitutionally

vague. As noted above, the Court of Appeals reversed, issuing a plurality opinion, two concurring opinions, and a dissenting opinion. The plurality applied the methodology for analyzing free expression challenges under Article I, section 8, set out in *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982). The plurality first concluded that, because the only restriction ORS 260.402 imposes is that a person must truthfully report the source of a campaign contribution, the statute is aimed at a forbidden effect of the unlawful expression, not the content of expression, and therefore must be analyzed under the second *Robertson* category. *Moyer*, 225 Or App at 91-93. According to the plurality, the legislature is entitled to enact election statutes that impose penalties for misleading the public, and the statute is not overbroad; therefore, the statute does not violate Article I, section 8. *Id.* As an alternative holding, the plurality analyzed the statute under the first *Robertson* category, assuming that ORS 260.402 is a restraint on the content of expression. *Id.* at 93. Under that *Robertson* category, the plurality concluded that the statute did not violate the free expression guarantee in Article I, section 8, because it came within a historical exception for fraud or perjury.[2] *Id.* at 95.

With regard to defendants' First Amendment argument, the plurality relied on *Buckley v. Valeo*, 424 US

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[2] There were two concurring opinions. Chief Judge Brewer and Judge Edmonds agreed that ORS 260.402 was a *Robertson* category-two law, because it focused on harmful effects and not on speech. *Moyer*, 225 Or App at 99 (Brewer, C. J., concurring). Judge Schuman, however, concluded that ORS 260.402 prohibits expression but concurred with the conclusion in the lead opinion that the statute is a contemporary variant of an historical exception to free expression guarantees. 225 Or App at 99-100 (Schuman, J., concurring).

1, 96 S Ct 612, 46 L Ed 2d 659 (1976), in which the United States Supreme Court held that a statutory requirement that campaign contributors disclose their identities does not violate the First Amendment. *Moyer*, 225 Or App at 96-97. The plurality reasoned that, under *Buckley*, a statutory requirement that such a disclosure be truthful similarly did not violate the First Amendment. *Id.*

Finally, the plurality rejected defendants' argument that the statute is unconstitutionally vague, concluding that the statute does not permit arbitrary or unequal application, is not an unlawful delegation of too much discretion to law enforcement, and provides fair warning of the conduct it prohibits. *Id.* at 97-98.

The dissent rejected the plurality's Article I, section 8, analysis. The dissent concluded that ORS 260.402 regulates the content of expression, because the statute regulates "the making of a contribution." *Id.* at 106 (Sercombe, J., dissenting). The dissent further concluded that ORS 260.402 does not fit within any historical exception and therefore violates Article I, section 8, of the Oregon Constitution. *Id.* at 108-13 (Sercombe, J., dissenting).

On review, defendants assert that, because the statute does not specify the forbidden effects to which it is directed, and because the presumed forbidden effects are not identified in any related statute and are not elements of the offense, the Court of Appeals mistakenly categorized ORS 260.402 as a *Robertson* second-category statute. Instead, defendants argue that, because the statute regulates campaign contributions, the statute directly restrains free expression and therefore is a *Robertson* first-category statute. According to defendants, the statute also vio-

lates Article I, section 8, because it is not wholly confined to any historical exception to Oregon's free expression guarantee. Defendants also reassert their claim that the statute similarly violates the free speech guarantee of the First Amendment.

To provide a complete understanding of the meaning and effect of ORS 260.402, we begin with an examination of its text and statutory context. The statute was originally passed by voter initiative and became effective in 1908 as part of the Corrupt Practices Act (Oregon Laws 1909, chapter 3), an initiative to limit candidates' election expenses and to define, prevent, and punish corrupt and illegal practices in nominations and elections. At that time, the statute provided:

> "No person shall make a payment of his own money or of another person's money to any other person in connection with a nomination or election in any other name than that of the person who in truth supplies such money; nor shall any person knowingly receive such payment or enter or cause the same to be entered in his accounts or records in another name than that of the person by whom it was actually furnished; *provided*, if the money be received from the treasurer of any political organization it shall be sufficient to enter the same as received from said treasurer."

(Emphasis in original.) The Corrupt Practices Act required candidates to report all contributions, and was intended to maintain the "purity" of the ballot and to prohibit illegal practices in elections, whether a measure or a candidate was involved. *Nickerson v. Mecklem*, 169 Or 270, 277, 126 P2d 1095 (1942). In an argument in support of the Act, the People's

Power League of Oregon stated that, among other things,

> "the secret use of money to influence elections [is] dangerous to liberty, because [it is] always used for the advantage of individuals or special interests and classes, and never for the common good. * * * The primary purpose of this bill is, as nearly as possible, to prevent the use of any means but arguments addressed to the voter's reason in the nominations and elections of Oregon."

Official Voters' Pamphlet, General Election, June 1, 1908, 103. Since then, the Corrupt Practices Act has required public disclosure of campaign contributions and has prohibited false name contributions like those alleged to be at issue here. *See, e.g.*, Oregon Code, title XXXVI, ch XXIV, § 36-2418 (1930) ("No person shall make a payment of his own money or of another person's money to any other person in connection with a nomination or election in any name other than that of the person who in truth supplies such money * * *.").

Currently, ORS 260.402 is a part of ORS chapter 260, which addresses campaign finance regulation, reporting requirements, election offenses, and enforcement. ORS 260.055(1) provides that all political candidates and treasurers for political committees must "keep detailed accounts" of contributions received and expenditures made by or on behalf of the candidate or the political committee. At various points during an election cycle, the candidates and political committees are required to file statements of their contributions and expenditures with the appropriate "filing officer." ORS 260.058; ORS 260.063; ORS 260.068; ORS 260.073; ORS 260.076; ORS

260.083. Any contribution from a person or campaign committee that "contributed an aggregate amount of more than $50" must be listed in the statement individually, along with the contributor's name, address, and occupation. ORS 260.083(1)(a).[3] "The statement may list as a single item the total amount of other contributions, but shall specify how those contributions were obtained." *Id.*

The filing officer is required to review the statements of contributions and expenditures and notify candidates or committees who have failed to file statements or whose statements fail to comply with all statutory requirements. ORS 260.205; ORS 260.215. Failure to file a proper statement of contributions and expenditures can lead to a court order compelling a proper filing, ORS 260.225(1); to the imposition of civil penalties, ORS 260.232; or even to the removal of a candidate or measure from the ballot, ORS 260.241(2).

The filing officer is also required to preserve the filed statements and may be required to prepare before each election a summary of the filed statements, which is to be made available to the public. ORS 260.255(1), (2). Those summaries must list "all contributions of more than $50." ORS 260.255(3).

As noted, ORS 260.402 (2003) provided, in part, that "[n]o person shall make a contribution to any other person, relating to a nomination or election of any candidate or the support or opposition to any measure, in any name other than that of a person

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[3] The statute was amended in 2007 and now provides similar requirements for contributors in "an aggregate amount of more than $100."

who in truth provides the contribution."As defined by ORS 260.005(3)(a), "contribution" includes:

> "(A) The payment, loan, gift, forgiving of indebtedness, or furnishing without equivalent compensation or consideration, of money, services other than personal services for which no compensation is asked or given, supplies, equipment or any other thing of value:
>
> "(i) For the purpose of influencing an election for public office or an election on a measure, or of reducing the debt of a candidate for nomination or election to public office or the debt of a political committee; or
>
> "(ii) To or on behalf of a candidate, political committee or measure; and
>
> "(B) Any unfulfilled pledge, subscription, agreement or promise, whether or not legally enforceable, to make a contribution."

Thus, the text and context of ORS 260.402 make it clear that the statute prohibits an actual or promised transfer of money, certain services, or things of value, either to a political campaign or for purposes of influencing an election for public office or an election on a measure, "in any name other than that of the person who in truth provides the contribution." As noted, according to defendants, that statutory prohibition impermissibly restrains expression in violation of Article I, section 8. We turn to that claim.

Article I, section 8, of the Oregon Constitution, provides:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject what-

> ever; but every person shall be responsible for the abuse of this right."

In *State v. Plowman*, 314 Or 157, 163-64, 838 P2d 558 (1992), *cert den*, 508 US 974 (1993), the court summarized the framework established in *Robertson* to analyze free expression challenges under Article I, section 8. First, laws that are directed to the *substance* of any opinion or any subject of communication violate Article I, section 8,

> "'unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach.'"

Plowman, 314 Or at 164 (quoting *Robertson*, 293 Or at 412). Second, laws that focus on proscribing the pursuit or accomplishment of forbidden *results* are divided further into two categories: (a) laws that focus on forbidden effects, but expressly prohibit expression used to achieve those effects, which are analyzed for overbreadth; and (b) laws that focus on forbidden effect, but do not refer to expression at all, which are analyzed for vagueness or for as-applied unconstitutionality. *Plowman*, 314 Or at 164.

Our first task, then, is to determine whether the statute is "written in terms directed to the substance of any `opinion' or any 'subject' of communication." *Robertson*, 293 Or at 412. As noted, ORS 260.402 is violated by an actual or promised transfer of money, services, or thing of value, directly or indirectly to a political campaign, "in any name other than that of the person who in truth provides the contribution."

As the Court of Appeals plurality observed in this case, describing the *Robertson* framework is not difficult; however, determining "the line between a [*Robertson*] first-category regulation (one that targets the content of speech) and a [*Robertson*] second-category regulation (one that targets only the harmful effects of speech) has proved somewhat elusive." 225 Or App at 89. The debate over whether ORS 260.402 is a *Robertson* category-one statute because it restricts campaign contributions—the dissenting view—or whether the statute is a *Robertson* category-two statute because it focuses on a forbidden effect but prohibits expression used to achieve that effect—the plurality view—was one of the issues (in addition to the disagreement over the applicability of a historical exception) that splintered the Court of Appeals.

Much of the debate in the Court of Appeals appears to have been prompted by conflicting signals from this court in at least two respects. First, the parties and the judges of the Court of Appeals disagreed about the meaning, effect, and application of certain statements by this court in *Vannatta v. Keisling*, 324 Or 514, 523, 921 P2d 770 (1997) (*Vannatta I*). We acknowledge that this court's various statements in *Vannatta I* to the effect that campaign contributions are constitutionally protected forms of expression by the political contributors could be understood to mean that, in every instance, the delivery to a candidate or campaign of a contribution is constitutionally protected expression. However, we recently clarified those statements in *Vannatta v. Oregon Government Ethics Comm.*, 347 Or 449, 465, 222 P3d 1077 (2009) (*Vannatta II*). In *Vannatta II* we pointed out that, *Vannatta I* had "assumed a symbiotic relationship between the making of contributions and the candidate's or campaign's ability to communicate a politi-

cal message," for purposes of that case, however, the court had not decided that, "in every case, the delivery to a public official, a candidate, or a campaign of money or something of value also is constitutionally protected expression as a matter of law." 347 Or at 465.

Second, the Court of Appeals plurality noted this court's statement in *City of Portland v. Tidyman*, 306 Or 174, 185-86, 759 P2d 242 (1988), that, to qualify as a *Robertson* category-two statute—a statute that focuses not on speech but on harmful effects—the operative text must "specify adverse effects" targeted by the legislature. *Moyer*, 225 Or App at 89. However, in *Vannatta I*, this court commented that, "[e]ven when the statute does not, by its terms, target a harm, a court may infer the harm from context." 324 Or at 536. That statement in *Vannatta I* was based on this court's analysis of the statute at issue in *State v. Stoneman*, 323 Or 536, 545-47, 920 P2d 535 (1996). In *Stoneman*, this court stated that, in determining the nature of the harmful effect targeted by a statute, the statute cannot be read in a vacuum: "An examination of the *context of* a statute, as well as of its wording, is necessary to an understanding of the policy that the legislative choice embodies." *Id.* at 546 (emphasis in original). Consistently with this court's statement in *Tidyman*, the court's contextual analysis in *Stoneman* established that the statute at issue in that case "prohibited the purchase of certain communicative materials, not in terms of their communicative *substance*, but in terms of their status *as the products of acts that necessarily have harmed the child participants*." 323 Or at 548 (first emphasis in original; second emphasis added). In our view, *Stoneman* correctly states that a statute should not be read in isolation, and that the legislature's policy

choice (the harm that is the target of the criminal prohibition) in some cases may be determined not only from the statute's text, but also from its context. That said, we now analyze ORS 260.402 under the *Robertson* methodology.

As noted, defendants are charged with "knowing[ly]" violating the part of ORS 260.402 that states that "[n]o person shall make a contribution to any other person, * * * in any name other than that of the person who in truth provides the contribution." In *Vannatta I*, this court observed that not every law related to the regulation of political campaign contributions and expenditures runs afoul of Article I, section 8:

> "*[L]awmakers [may] choose to impose requirements distinct from contribution or expenditure limitations (e.g., requirements of disclosure of financing sources and the extent of any gift)* as well as various sanctions (*e.g.*, civil or criminal penalties, disqualification from the ballot or Voters' Pamphlet, and the like) and their choice may not *necessarily* offend the constitutional requirement."

Vannatta I, 324 Or at 523 (first emphasis added; second emphasis in original). On its face, ORS 260.402 seems more akin to the kind of statutes described in *Vannatta I* that do not offend the Article I, section 8, expression guarantee. The statute imposes no restriction on what any person may say, whether contributor, campaign agent, or candidate. Moreover, as we explained in *Vannatta II*, defendants' argument that the delivery of gifts, money, or services is expression in every case is incorrect.

Robertson makes it clear, however, that statutes that impose criminal sanctions for deception that can be accomplished only through expression violate Article I, section 8, unless they fall within some well-established historical exception to free expression guarantees. *Id.*, 293 Or at 412 (listing examples such as "perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants"). Here, ORS 260.402 prohibits communicating a name to the recipient of the contribution when that name is not the name of "the person who in truth provides the contribution." In other words, the falsity that the statute prohibits can only be achieved through expression—through one person's communication of a falsehood to another person. It is for that reason that the statute must be classified as a *Robertson* category one law.[4] As a result, ORS 260.402 violates Article I, section 8, unless the statute falls within a historical exception as described in *Robertson*. We turn to that question.

In *Robertson*, this court recognized that historical exceptions to Article I, section 8, were not restricted

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[4] The Court of Appeals plurality concluded that the statute is directed, not at the expression itself, but at the harmful effects of expression (concealing from the recipient and the public the true identity of a contributor). The difficulty, however, is that, although the statute is directed against concealing the identity of a contributor, the law is violated whether or not the recipient of the contribution or the public actually is misled about the identity of the contributor. In other words, the statute is violated when the contribution is made, whether or not any harmful effect occurs. Because the targeted effects are not expressed in the statute, and because, unlike the statute at issue in *Stoneman*, the targeted harm need not occur to violate the statute, the statute cannot be classified under the *Robertson* methodology as a category-two law.

solely to the actual statutes or the common law in place when the Oregon Constitution was adopted. Instead, the court recognized that successive legislatures would continue to revise crimes and other laws and create new crimes and laws in the light of societal changes and needs:

> "The legislature, of course, may revise these crimes and extend their principles to contemporary circumstances or sensibilities. If it was unlawful to defraud people by crude face-to-face lies, for instance, free speech allows the legislature some leeway to extend the fraud principle to sophisticated lies communicated by contemporary means. *Constitutional interpretation of broad clauses locks neither the powers of lawmakers nor the guarantees of civil liberties into their exact historic forms in the 18th and 19th centuries, as long as the extension remains true to the initial principle.*"

Robertson, 293 Or at 433-34 (emphasis added).

Whether a statute that restrains expression is "wholly confined within some historical exception" requires the following inquiries: (1) was the restriction well established when the early American guarantees of freedom of expression were adopted, and (2) was Article I, section 8, intended to eliminate that restriction. *State v. Henry*, 302 Or 510, 515-25, 732 P2d 9 (1987).

As with the question whether the statute is a *Robertson* category-one or category-two law, the parties and the Court of Appeals disagree whether ORS 260.402 qualifies as a contemporary variant of some well-recognized restriction on expression at the time that Article I, section 8, was adopted. In that regard,

the state takes the position that ORS 260.402 is a contemporary variant of the historical prohibition against fraud, forgery, and perjury involving false communication that preceded the adoption of Article I, section 8. Although defendants agree that such restrictions were in place before the adoption of the Oregon Constitution, they contend that ORS 260.402 cannot be considered a modern variant of common-law fraud, because it "contains none of the traditional elements of fraud."[5] According to defendants, unlike common-law fraud, ORS 260.402 does not require that a representation be made in connection with the contribution; the statute does not contain an intent-to-deceive element; the statute is not limited to material misrepresentations; and the statute does not require reasonable reliance or injury in fact.[6] We are not persuaded. For the following reasons, we conclude that ORS 260.402 falls within a historical exception to Article I, section 8.

First, in his *Commentaries on the Laws of England*, William Blackstone recognized that misrepresentations that contributed to "public inconvenience" were

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[5] Defendants also argue that the statute is not a modern variant of perjury, false swearing, or forgery achieved through false communication. Because we conclude that ORS 260.402 is a modern variant of fraud and therefore is within a historical exception, we need not address defendants' arguments regarding perjury, false swearing, or forgery.

[6] According to defendants, proof of fraud requires a showing that (1) the accused falsely represented a material fact; (2) the accused knew the representation was false; (3) the representation was made with the intent to induce the recipient to act or refrain from acting; (4) the recipient justifiably relied on the misrepresentation; and (5) the recipient was damage [sic] by that reliance.

actionable offenses. In the volume entitled "Of Public Wrongs," Blackstone wrote:

> "The vice of lying, which consists (abstractedly taken) in a criminal violation of truth, and therefore in any shape is derogatory from sound morality, is not however taken notice of by our law, *unless it carries with it some public inconvenience, as spreading false news*; or some social injury, as slander and malicious prosecution, for which a private recompense is given."

William Blackstone, 4 *Commentaries on the Laws of England* *41-42 (1769) (emphasis added). At that time, the "public inconvenience" associated with misrepresenting one's identity in court or before a public official was considered grievous and was classified as a felony under English law. In his section on offenses against public justice, Blackstone noted:

> "Likewise by statute 21 Jac. I. c. 26 to acknowledge any fine, recovery, deed enrolled, statute, recognizance, bail, or judgment, in the name of another person not privy to the same, is felony without benefit of clergy. Which law extends only to proceedings in the courts themselves: but by statute 4 W. & M. c. 4 *to personate any other person [before any] commissioner authorized to take bail in the country, is also felony. For no man's property would be safe, if records might be suppressed or falsified, or persons' names be falsely usurped in courts, or before their public officers.*"

Blackstone, 4 *Commentaries* at *127 (emphasis added). Given Blackstone's observations that providing false identifying information to governmental officials or public bodies were sanctionable offenses,

it is unlikely that the framers of the United States Constitution or the Oregon Constitution considered that kind of false communication a form of constitutionally protected expression.

In Oregon, misrepresentations made with intent to injure or defraud, somewhat like those described by Blackstone, were statutorily prohibited as criminal acts as early as 1864, only five years after the adoption of the Oregon Constitution in 1859. That early statute covered a variety of misrepresentations, including those aimed at defrauding individuals and the "body politic."[7] *See General Laws of Oregon,* Crim Code, ch LIII, § 727, pp 577-78 (Deady 1845-1864) (so stating). The 1864 statute provided:

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[7] Although the term "defraud" was undefined within the 1864 statute, lawyers of the day would have understood that a variety of meanings could be attached to the term. A contemporaneous legal dictionary of the period, defining "fraud" and "to defraud" together in the same passage, provided, among other meanings:

> "4. Frauds may be also divided into actual or positive and constructive frauds.
>
> "5. An *actual or positive fraud* is the intention and successful employment of any cunning, deception, or artifice, used to circumvent, cheat, or deceive another. * * *
>
> "6. By *constructive fraud* is meant such a contract or act, which, though not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, yet by its tendency to deceive or mislead them, or to violate private or public confidence, or to impair or injure the public interests, is deemed equally reprehensible with positive fraud, and therefore, is prohibited by law, as within the same reason and mischief as contracts and acts done *malo animo*."

John Bouvier, 1 *Law Dictionary* 547 (9th ed 1860) (emphasis in original; internal citations omitted).

"If any person shall, with intent to injure or defraud any one, falsely make, alter, forge or counterfeit any public record whatever, or any certificate, return or attestation of any clerk, notary public or other public officer, in relation to any matter wherein such certificate, return or attestation may be received as legal evidence, or any note, certificate or other evidence of debt issued by any officer of this state, or any county, town or other municipal or public corporation therein, authorized to issue the same, or any contract, charter, letters patent, deed, lease, bill of sale, will, testament, bond, writing obligatory, undertaking, letter of attorney, policy of insurance, bill of lading, bill of exchange, promissory note, evidence of debt, or any acceptance of a bill of exchange, endorsement or assignment of a promissory note, or any warrant, order or check, or money, or other property, or any receipt for money or other property, or an acquittance or discharge for money or other property, or any plat, draft or survey of land, or shall, with such intent, *knowingly utter or publish as true and genuine, any such false, altered, forged or counterfeited record, writing, instrument or matter whatever*, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary, not less than two, nor more than twenty years."

General Laws of Oregon, Crim Code, ch XLV, § 584, pp 545-46 (Deady 1845-1864) (emphasis added).

The 1864 statute prohibiting various forms of false communication, consistent with Blackstone's observations, is a further demonstration of the unlikelihood that the framers of the Oregon Constitution—many

of whom were serving in the legislature when the 1864 statute was enacted—considered false communication in connection with public records and matters of legitimate governmental concern to be protected by Article I, section 8's guarantee of the free expression of opinion.[8]

Second, this court previously has upheld campaign laws providing sanctions and penalties for political candidates who mislead the public or engage in fraud. *Vannatta I*, 324 Or at 544. In *Vannatta I*, this court upheld, as within a historical exception, a provision of a ballot measure providing that, when a candidate reneges on a promise not to exceed a specified amount of campaign expenditures, the Secretary of State is required to publish in the Voters' Pamphlet a bold-print notice that the candidate failed to abide by his or her promise. The court described a candidate who reneges on his or her promise as one who "has misled the electorate" and stated that "[l]aws that are targeted at fraud do not violate Article I, section 8, because they constitute a historical exception to Article I, section 8." *Id.*

Despite this court's observation in *Vannatta I*, defendants argue strenuously that, because ORS 260.402 does not contain an intent-to-deceive element, the statute cannot be considered a modern variant of common-law fraud. We have two responses. First, we note that here the indictment alleges that defendants "knowing[ly]" made "a contribution to a candidate * * * in a name other than

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[8] A cursory review of the Oregon Revised Statutes reveals at least 150 statutes that impose sanctions and punishments for various forms of false communication. In particular, many of those statutes involve the communication of identifying information in one form or another to governmental entities.

* * * that of the person who in truth provided the contribution." Necessarily, then, the state will be required to prove at trial that defendants acted with an awareness that their conduct was of a "nature so described or that a circumstance so described exists." *See* ORS 161.085(8) ("knowingly" or "with knowledge," when used with respect to conduct or to a circumstance described by a statute defining an offense, means that a person acts with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists).[9]

Second, this court already has held that a statute that prohibits fraud on the electorate need not include an intent element to come within a historical exception. *Vannatta I* upheld the constitutionality of a provision requiring the public identification of candidates who broke expenditure-cap promises, even though that provision did not require that the deceit have been intentional:

> "The fact that a candidate may have intended to abide by expenditure limitations when he or she made the pledge, and only later decided to ignore that promise, does not make the failure to abide by the promise any less a fraud on the voters who have relied on the candidate's Voters' Pamphlet statement to choose their candidate."

324 Or at 544 n 28.

In our view, there is no important difference between statutes requiring the public identification of candidates who violate expenditure-cap pledges, sta-

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[9] Whether it would be permissible under Article I, section 8, to punish a contributor for inadvertently making a contribution in the name of another person is a question not presented in this case.

tutes prohibiting candidates from making material misstatements during campaigns, and the statutory requirement in ORS 260.402 that the identification of political contributors be truthful. As our cases establish, the elements of a modern statute need not be identical or matched perfectly with historical prohibitions to fall within a historical exception. Prohibiting the concealment of the identity of the true provider of a political contribution from either the recipient of the contribution, the public, or both, is, we conclude, an extension or modern variant of the initial principle that underlies the historic legal prohibition against deceptive or misleading expression. Thus, in our view, ORS 260.402 falls within a "historical exception," whether the exception is described as one related to misleading the electorate, as identified in *Vannatta I*, or simply is described as a contemporary variant of the exception for common-law fraud. Because the restriction on making a contribution using another person's name in ORS 260.402 falls within a historical exception, the statute does not violate Article I, section 8, of the Oregon Constitution.

We turn to defendants' other arguments. Defendants assert that the statute violates the First Amendment to the United States Constitution because it is overbroad, in that it criminalizes contributions made in another's name without requiring the *intent* to deceive.

As we noted in *Vannatta I*, 324 Or at 521, the United States Supreme Court takes a different approach to expression challenges under the First Amendment than this court does with regard to expression challenges under Article I, section 8. In *Buckley v. Valeo*, the United States Supreme Court

determined that political expenditures and contributions were forms of expression under the First Amendment, but also concluded that contributions were less central to core First Amendment expression, and therefore could be subject to governmental restriction through a balancing-of-interests analysis. 424 US at 28-29. The court in *Buckley* concluded that contributions are a less-protected form of expression than are expenditures, based on two assumptions about contributions: (1) although contributions may result in speech, that speech is by the candidate and not by the contributor; and (2) contributions express only general support for a candidate and do not communicate the reasons for that support. *Buckley*, 424 US at 21. Relying on those assumptions, the Supreme Court concluded that a statutory requirement that campaign contributors disclose their identities did not violate the First Amendment, because the disclosure requirement was narrowly limited to those situations in which the information sought had a substantial connection with the governmental interests to be advanced; that is, "disclosure helps voters to define more of the candidates' constituencies." *Id.* at 81. The Court explained that "[t]he burden imposed by [disclosure] is no prior restraint, but a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Id.* at 82. *See also Citizens United v. Federal Election Commission*, __ US __, 130 S Ct 876 (2010) (campaign expenditure disclosure and disclaimer requirements do not unconstitutionally restrain speech; such requirements provide the electorate with information and insure that the voters are fully informed as to who is speaking). A law that forbids making a contribution using another person's

name is not, in our view, more burdensome than a law like the one at issue in *Buckley*, requiring disclosure of the identity of the contributor in the first instance. We therefore conclude that ORS 260.402 does not violate the First Amendment.[10]

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[10] Defendants also argue that the statute is overbroad, because it criminalizes speech that would not deceive the electorate. Defendants observe that ORS 260.402 criminalizes all contributions made in another person's name, regardless of the dollar amount contributed. Defendants assert, however, that ORS 260.083 does not require statements of contributions and expenditures to report the identity of contributors who contribute less than a specific dollar amount ($50 in 2003). Therefore, defendants contend, ORS 260.402 criminalizes some speech that could not deceive the public—contributing $50 or less under a false identity—because the false identity would never be disclosed to the public.

Defendants' reasoning misses an important point, however. The $50 limit in ORS 260.083 is not the amount of a single contribution—it is the total dollar amount contributed by a particular individual. ORS 260.083 required the statement of contributions and expenditures to "list the name, occupation and address of each person * * * that contributed *an aggregate amount* of more than $50." (Emphasis added.) By making the disclosure of the contributor's identity turn on the aggregate amount contributed, the statute prohibits contributors from concealing their identity by breaking contributions into amounts of $50 or less.

One cannot determine whether a contributor's aggregate contributions exceed $50 without knowing the identities of all contributors, including those who contributed $50 or less. To comply with ORS 260.083, then, the party required to file the statement of contributions and expenditures must know the true identities of all contributors, whether or not their individual contributions exceed $50. Thus, a false representation as to the identity of a contributor—regardless of the amount of the contribution—deceives the filing party and interferes with the proper operation of ORS 260.083.

Finally, we turn to defendants' contention that ORS 260.402 is unconstitutionally vague under Article I, sections 20 and 21, of the Oregon Constitution and the First and Fourteenth Amendments to the United States Constitution. Defendants argue that the statute provides insufficient notice of the criminalized conduct, delegates too much discretion to law enforcement, and has a chilling effect on protected speech.

Regarding a vagueness challenge under the Oregon Constitution, this court stated in State v. Graves, 299 Or 189, 195, 700 P2d 244 (1985), that:

> "[A] criminal statute must not be so vague as to permit a judge or jury to exercise uncontrolled discretion in punishing defendants, because this offends the principle against *ex post facto* laws embodied in Article 1, section 21, of the Oregon Constitution. The equal privileges and immunities clause is also implicated when vague laws give unbridled discretion to judges and jurors to decide what is prohibited in a given case, for this results in the unequal application of criminal laws. A criminal statute need not define an offense with such precision that a person in every case can determine in advance that a specific conduct will be within the statute's reach. However, a reasonable degree of certainty is required by Article I, sections 20 and 21."

(Internal citations and footnote omitted.)

This court has also stated that "absolute precision is not required to overcome a facial vagueness challenge." *Illig-Renn*, 341 Or at 243. Here, defendants assert that the statutory phrases "relating to" and "in truth provides" are not adequately defined by

common usage or context. Defendants argue that, as a result, the statute could reach any donation that "eventually serves to benefit a measure or campaign." According to defendants, the words "relating to" are so broad that the statute criminalizes a person's decision to pick up the dinner tab when the person and his or her friends "decide if they should encourage a person to run for a local office." We disagree with defendants. The phrase "relating to" must be read in the context of the entire statute. For the convenience of the reader, we again set out the text of ORS 260.402, which provided, in part:

> "No person shall make a contribution to any other person, relating to a nomination or election of any candidate or the support or opposition to any measure, in any name other than that of the person who in truth provides the contribution."

"Contribution" is defined by ORS 260.005(3), which we quoted earlier. (Exceptions to the definition of "contribution" are set out in ORS 260.007.) The phrase "relating to" thus ties "contribution" to only transfers made "[f]or the purpose of influencing an election for public office or an election on a measure, or of reducing the debt of a candidate for nomination or election to public office or the debt of a political committee," or payments made "[t]o or on behalf of a candidate, political committee or measure[.]" ORS 260.005(3)(a)(A)(i), (ii). In addition, by using the present-tense phrase "relating to," the legislature established that the contribution must relate to a candidate or measure at the time it is made. *See Martin v. City of Albany*, 320 Or 175, 181, 880 P2d 926 (1994) ("[t]he use of a particular verb tense in a statute can be a significant indicator of the legislature's intention"). Thus, contributions "relating to" a

candidate or measure are those that are made to the candidate or to the campaign supporting a measure, or for the purpose of influencing an election.

Defendants also challenged the phrase "in truth provides" as vague. Again, we disagree. ORS 260.402 provides that a person who makes a contribution "in any name other than that of the person who in truth provides the contribution" violates the statute. Because the statute applies only to contributions made *in* the name of a specific person, the statute applies only when money has been contributed "in" someone's "name"—that is, when the contribution is attributed to a specific person.[11] When read as a whole, the statute provides adequate notice of what conduct is proscribed, and thus is not impermissibly vague in violation [sic] the Oregon Constitution.

In assessing a claim that a criminal statute fails to give fair warning under the United States Constitu-

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[11] Because ORS 260.402 applies only to those contributions that are made in someone's name, it does not criminalize anonymous contributions. However, ORS 260.083 requires that committees disclose the names and addresses of all individuals and entities that contribute more than the threshold reporting amount. Accordingly, the Secretary of State's administrative rules require campaigns to refuse or to disgorge contributions for which campaigns cannot provide that information—those funds that are donated anonymously. *See* 2010 Campaign Finance Manual at 29 ("No committee shall accept an anonymous contribution. If a committee cannot identify a contributor, the contribution must be donated to an organization that can accept anonymous contributions."); OAR 165-012-0005 (designating *Campaign Finance Manual* and associated forms "as the procedures and guidelines to be used for compliance with Oregon campaign finance regulations"). This case does not involve anonymous contributions, and we do not address whether Article I, section 8, would prevent the legislature from prohibiting anonymous campaign contributions.

tion, we adhere to the standard that federal courts have applied to criminal and quasi-criminal statutes—whether the statute would "'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.'" *Illig-Renn*, 341 Or at 241 (quoting *Grayned v. City of Rockford*, 408 US 104, 108, 92 S Ct 2294, 33 L Ed 2d 222 (1972)). As we explained above, when read as a whole, the statute provides adequate notice of what conduct is proscribed. Accordingly, we conclude that ORS 260.402 gave adequate notice that it is unlawful to make a contribution using another person's name. Therefore, we reject defendants' vagueness challenge.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

APPENDIX E

260.402 Contributions in false name.

No person shall make a contribution to any other person, relating to a nomination or election of any candidate or the support or opposition to any measure, in any name other than that of the person who in truth provides the contribution. No person shall knowingly receive the contribution or enter or cause it to be entered in accounts or records in another name than that of the person by whom it was actually provided. However, if the contribution is received from the treasurer of any political committee, it shall be sufficient to enter it as received from the treasurer.

APPENDIX F

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX G

IN THE CIRCUIT COURT OF
THE STATE OF OREGON
FOR MULTNOMAH COUNTY

[Filed SEP 14, 2004]

Court Nbr. 04-09-35104 DA 2023278-1
04-09-35105 DA 2023278-2
04-09-35106 DA 2023278-3

Crime Report AG 04-000005

STATE OF OREGON,

Plaintiff,

v.

THOMAS PAUL MOYER
DOB: 03/02/1919

AND

VANESSA COLLEEN KASSAB
DOB: 03/17/1978 also known as
VANESSA STURGEON
DOB: 03/17/1978

AND

SONJA R. TUNE
DOB: 09/03/1947

Defendant(s).

Indictment for Violation of
ORS 260.402 and 260.993(2) (1,2)

The above-named defendant(s) are accused by the Grand Jury of Multnomah County, State of Oregon, by this indictment of crime(s) of COUNT 1,2 — CONTRIBUTION IN FALSE NAME

COUNT 1
CONTRIBUTION IN FALSE NAME

The said defendants **THOMAS PAUL MOYER and VANESSA COLLEEN KASSAB**, on or about May 16, 2003, in the County of Multnomah County, State of Oregon, did unlawfully and knowing [sic] make a contribution to a candidate, in relation to his campaign for election to public office, in a name other than other than that [sic] of the person who in truth provided the contribution, to-wit: by making a contribution of $2,500 in the name of **"VANESSA KASSAB"** to Jim Francesconi in support of his campaign for the Mayor of Portland, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 2
CONTRIBUTION IN FALSE NAME

The said defendants **THOMAS PAUL MOYER and SONJA R TUNE**, on or about May 16, 2003, in the County of Multnomah County, State of Oregon, did unlawfully and knowing [sic] make a contribution to a candidate, in relation to his campaign for election to public office, in a name other than other than that [sic] of the person who in truth provided the contribution, to-wit: by making a contribution of $2,000 in the name of **"SONJA TUNE"** to Jim Francesconi in support of his campaign for the Mayor of Portland, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon.

Dated at Portland, Oregon, in the county aforesaid, on September 14, 2004.

Witnesses

Examined Before the Grand Jury
in person (unless noted)

Heidi Kolibaba
Pamela Chapel

X A TRUE BILL

/s/ Linda E. Baron
/s/ Linda E. Baron
Foreperson of the Grand Jury

MICHAEL D. SCHRUNK (67111)
District Attorney
Multnomah County, Oregon

By /s/ _____
Assistant Attorney General and
Special Deputy District Attorney

Security Amount (Def - MOYER) $2,500 + $2,500

(Def - KASSAB) $2,500

(Def - TUNE) $2,500

AFFIRMATIVE DECLARATION

The District Attorney hereby affirmatively declares for the record, as required by ORS 161.566, upon the date scheduled for the first appearance of the defendant, and before the court asks under ORS 135.020 how the defendant pleads to the charge(s), the State's intention that any misdemeanor charged herein proceed as a misdemeanor. CHARLES R. FRENCH OSB 81467 //dim